(13) (14)

Nos. 83-1065, 83-1240

In the
Supreme Court of the United States

OCTOBER TERM, 1983

THE COUNTY OF ONEIDA, NEW YORK, ET AL.

v.

THE ONEIDA INDIAN NATION OF
NEW YORK STATE, ET AL.

THE STATE OF NEW YORK

v.

THE ONEIDA INDIAN NATION OF
NEW YORK STATE, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT.

JOINT APPENDIX

[List of Counsel on Inside Cover]

PETITION FOR CERTIORARI IN NO. 83-1065
FILED DECEMBER 28, 1983
PETITION FOR CERTIORARI IN NO. 83-1240
FILED JANUARY 25, 1983
CERTIORARI GRANTED MARCH 19, 1984

263 PP

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Chronological List of Relevant Docket Entries.

February 5, 1970 — Complaint of Oneida Indian Nation of New York and Oneida Indian Nation of Wisconsin filed in U.S. District Court for Northern District of New York.

July 29, 1970 — Amended Complaint of Oneida Indian Nation of New York and Oneida Indian Nation of Wisconsin.

November 12, 1970 — Notice of defendants' motion to dismiss filed.

November 18, 1970 — Notice of motion and motion to dismiss filed.

November 11, 1971 — Memorandum-Decision and Order of Judge Port on motions for summary judgment dismissing complaint filed.

September 21, 1972 — Certified copy of judgment of Circuit Court of Appeals affirming order and judgment of district court.

January 21, 1974 — Decision of Supreme Court of United States reversing dismissal of action filed.

May 20, 1974 — Decision of Second Circuit Court of Appeals remanding case to the district court filed.

June 4, 1974 — Order on mandate vacating order dismissing complaint and reinstating amended complaint filed.

October 24, 1974 — Answer of defendant County of Oneida filed.

October 24, 1974 — Third-party complaint against the State of New York by the County of Oneida filed.

November 15, 1974 — Third-party complaint against the State of New York by the County of Madison filed.

September 26, 1975 — Answer and affirmative defense of County of Madison filed.

November 12, 1975 — Trial on liability issues commenced.

November 13, 1975 — Motion to add Oneida of the Thames Band Council as a party plaintiff allowed.

July 12, 1977 — Memorandum-Decision and Order of Judge Port finding liability against the defendant Counties of Madison and Oneida filed.

April 30, 1979 — Notice of motion of defendant County of Madison for summary judgment filed.

May 17, 1979 — Order of Judge Port denying motion for summary judgment filed.

October 3, 1979 — Certified copy of Decision of Circuit Court of Appeals granting motion for leave to appeal pursuant to 28 U.S.C. § 1292(b) filed.

March 24, 1980 — Decision of Circuit Court of Appeals filed.

February 5, 1981 — Pre-trial memorandum of the Counties of Madison and Oneida, New York, on the issue of remedies filed.

February 27, 1981 — Plaintiff's motion to strike portions of defendants' pre-trial memorandum filed.

March 4, 1981 — Order of Judge Port (3/2/81) striking a portion of the defendants' pre-trial memorandum and treating it as the denial of a motion to dismiss filed.

March 12, 1981 — Objection of defendants to order of Court striking portion of pre-trial memorandum and denying it as a motion to dismiss.

May 20, 1981 — Order of Judge Port (5/18/81) that the political question doctrine does not preclude the fashioning of a remedy filed.

September 14, 1981 — Trial on damages issues commenced.

September 28, 1981 — Defendants' Motion to dismiss and motion for summary judgment filed.

October 5, 1981 — Decision of Judge Port denying motion to dismiss filed.

October 5, 1981 — Partial findings of fact and conclusions of law filed.

October 5, 1981 — Order of Judge Port awarding damages to the plaintiffs against the County of Madison in the sum of $9,060 with interest at 6% per annum from January 1, 1968, and judgment in favor of the plaintiffs against the defendant County of Oneida in the sum of $7,634 with interest at 6% per annum from January 1, 1968 filed.

October 28, 1981 — Notice of appeal of the Counties of Madison and Oneida filed.

March 5, 1982 — Motion of the State of New York to dismiss third-party complaints of Counties of Madison and Oneida, New York, filed.

March 9, 1982 — Motion for summary judgment on the third-party complaints against the State of New York by the Counties of Madison and Oneida, New York, filed.

March 31, 1982 — Certified copy of Circuit Court of Appeals order remanding action to district court filed.

May 5, 1982 — Order of Judge Port denying motion of third-party defendant State of New York to dismiss third-party complaints and granting motion of third-party plaintiffs for summary judgment against the State of New York filed.

May 19, 1982 — Judgment on third-party complaints against the State of New York by the Counties of Madison and Oneida, New York, to the effect that the Counties are awarded judgment against the State of New York for any portion of the plaintiffs' recovery herein directed or awarded, including any interest thereon, that is paid by either or both of the Counties, together with interest at the rate of 6% per annum from the date of any such payment.

May 21, 1982 — Notice of appeal by State of New York filed.

June 14, 1982 — Notice of appeal of the Counties of Madison and Oneida, New York, filed.

September 29, 1983 — Opinion of the Court of Appeals for the Second Circuit, filed.

COMPLAINT, Filed 2-5-70.

United States District Court

Northern District of New York

THE ONEIDA INDIAN NATION OF NEW YORK STATE, also known as the ONEIDA NATION OF NEW YORK, also known as the ONEIDA INDIANS OF NEW YORK, and THE ONEIDA INDIAN NATION OF WISCONSIN, also known as the ONEIDA TRIBE OF INDIANS OF WISCONSIN, INC.,

Plaintiffs,

-vs-

THE COUNTY OF ONEIDA, NEW YORK and THE COUNTY OF MADISON, NEW YORK,

Defendants.

Civil Action No. 70-CV-35

Plaintiffs, for their complaint against defendants, allege and show that:

1. Plaintiff, THE ONEIDA INDIAN NATION OF NEW YORK STATE, is an Indian Nation or Tribe with its principal Reservation and situs in the Counties of Oneida and Madison, State of New York. Plaintiff, THE ONEIDA INDIAN NATION OF WISCONSIN, is an incorporated Indian Nation or Tribe with its principal Reservation and situs in the State of Wisconsin. Defendants are Counties of the State of New York.

2. The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.00. Jurisdiction is conferred by diversity of citizenship.

3. From time immemorial, down to the time of the American Revoluntionary War, the plaintiffs owned some 6,000,000 acres of land in New York State, as shown on the map annexed as Exhibit A. In the American Revolutionary War, the plaintiffs fought on the side of the Thirteen Colonies and rendered valuable and material support, which helped the Colonies attain victory and independence.

4. The Congress of the United States was empowered to regulate commerce with the Indian Tribes under Article IX of the Articles of Confederation and under Article I, Section 8, of the United States Constitution. Under this power, treaties were made with the Oneidas, which read in part as follows:

Treaty with Six Nations — Ft. Stanwix 1784

"Article 2. The Oneida and Tuscarora Nations shall be secured in the possession of lands on which they are settled."

Treaty with Six Nations — Ft. Harmar 1789

"Article 3. The Oneida and Tuscarora Nations are also again secured and confirmed in the possession of their respective lands."

Treaty with Six Nations — Canandaigua 1794

"Article 2. The United States acknowledge the lands reserved to the Oneida, Onondaga and Cayuga Nations, in their respective treaties with the State of New York, and called their reservations to be their property; and the United States will never claim the same, nor disturb them . . . in the free use and enjoyment thereof; but the said reservation shall remain theirs until they choose to sell the same to the people of the United States, who have the right to purchase."

"Article 7. Lest the firm peace and friendship now established should be interrupted by the misconduct of individuals, the United States and Six Nations agree that for injuries

done by individuals on either side no private revenge or retaliation shall take place, but instead complaint shall be made by the party injured to the other: by the Six Nations or any of them to the President of the United States . . . and such prudent measures shall then be pursued as shall be necessary to preserve our peace and friendship unbroken . . ."

Treaty with Oneida, Tuscarora and Stockbridge Indians — Oneida 1974

"Whereas, In the late war between Great Britain and the United States of American, a body of the Oneida and Tuscarora and Stockbridge Indians adhered faithfully to the United States and assisted them with their warriors, . . . and as the United States in the time of their distress, acknowledged their obligations to these faithful friends, and promised to reward them . . ." (Here followed promises to erect a sawmill and other improvements on the Reservation and to compensate the Oneidas for damages suffered in the War.)

5. To implement their treaty obligations to the Oneidas and other Indians, the United States enacted in 1790 what is now Section 177 of the Federal Indian Law, 25 U.S.C.A. The meaning of the protection promised in these treaties was explained by President George Washington to a delegation of Senecas on December 29, 1790. Interpreting the 1784 treaty he said:

"Here, then, is the security for the remainder of your lands. No state, nor person, can purchase your lands, unless at some public treaty, held under the authority of the United States. The General Government will never consent to your being defrauded, but it will protect you in all your just rights.

"Here well and let it be heard by every person in your nation, that the President of the United States declares, that the General Government considers itself bound to protect you in all the lands secured to you by the treaty of Fort Stanwix, the 22d day of October, 1784, excepting such parts as you may since have fairly sold, to persons properly authorized to purchase of You."

Thus, the United States by formal treaties, the supreme law of the land, and George Washington, our first President, have given their sacred word and promise:

"The General Government will never consent to your being defrauded, but it will protect you in all your just rights."

6. Plaintiffs hereby invoke Section 177 of the Federal Law, Title 25 U.S. Code, which reads as follows:

"Section 177. Purchases or Grants of lands from Indians

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claims to land within such State, which shall be extinguished by treaty. R.S. Section 2116."

7. Plaintiffs hereby invoke Section 194 of the Federal Indian Law, Title 25 U.S. Code, which reads as follows:

> "Section 194. Trial of right of property; burden of proof
>
> In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership. R.S. Section 2126."

8. In the so-called "Treaty" at Fort Stanwix in 1788, the plaintiffs purportedly ceded most of their lands (over 5,000,000 acres) to the State of New York, their former ally, for a consideration of $5500 plus an annuity of $600 per year forever. Reserved from this cession was a tract of land of about 300,000 acres located in what is now denoted the Counties of Oneida and Madison. Such tract is herein called plaintiffs' "Reservation" or "the Reservation" and is described in paragraph Second of said Treaty. A copy of the 1788 treaty is annexed to and made a part of this complaint as Exhibit "B".

9. The Reservation was still intact in 1790, at the time of enactment of the "Indian Non-Intercourse Act" (1 Stat. 137 (1790), similar in intent to Section 177 of 25 U.S.C.A.), which expressly forbade and declared invalid any sale of Indian Reservations without the consent of the United States.

10. In the year 1795 representatives of New York State met with representatives of plaintiffs and concluded another "Treaty" whereby plaintiffs purportedly deeded to the State a large portion of the Reservation. Exhibit "C", annexed, is a copy of said "Treaty" and contains a description of the lands purportedly deeded to the State. It is the lands described in Exhibit C which are the subject of this action, hereinafter called the "premises".

11. All of the Indians, representatives of plaintiffs, who signed the said "Treaty" of 1795 (herein the "Treaty") signed with an

"X" in place of a signature indicating, on information and belief, that they could not read or write.

12. At the time of making of said "Treaty" of 1795, the federal law forbidding sale of Indian lands without consent of the United States was in full force and effect, and the premises were lands subject to such law. See 1 Stat. 329 (1793). No federal consent, on information and belief, was ever obtained to such purported deed to the State. On information and belief, no U.S. Commissioner was present at the negotiations or the execution of such purported "Treaty". On information and belief, the U.S. has never approved or ratified such purported "Treaty", and the purported transfer is invalid under federal law.

13. On information and belief, the consideration to be paid to plaintiffs under such "Treaty" was based on a perpetual annuity of Three Dollars a year for every hundred acres (3 cents per year per acre), which computed at 6% amounts to a principal price of fifty cents per acre.

14. In the period 1792-1795, the Holland Land Company through its agent, John Lincklaen of Cazenovia, was selling nearby land (just south of the premises) at from $1.50 to $4.00 per acre unimproved. From 1795 to the early 1800's, nearby land was sold to settlers at $4.00, $5.00 and $6.00 per acre.

15. The lands (the premises) purchased for $0.50 per acre from plaintiffs in 1795 were sold off in 1797 to settlers and developers for a consideration fixed by state law at $3.53-1/2 per acre. This represented a profit to the state of $3.03-1/2 per acre on the premises, a 500% profit in two years.

16. On information and belief, the representatives of New York State misrepresented to plaintiffs the value of their land and induced them to sell it for an unconscionable and inadequate price.

17. New York State also knew and admitted that federal law forbade such land acquisitions, since it recognized the need for U.S. consent in connection with a further land purchase from plaintiffs in 1798 and in connection with four other acquisitions of Indian lands from 1797-1802.

18. Subsequent to the "Treaty" of 1795, part of the premises purportedly deeded became the property of the Counties of Oneida

and Madison, New York, the defendants herein. The defendants currently occupy parts of said premises for buildings, roads, and other public improvements. By reason of said occupancy plaintiffs have been denied use of such parts of the premises and have been damaged to the extent of at least $10,000, exclusive of costs and interest.

19. By bringing this action, plaintiffs do not waive or relinquish any right or action in respect of its lands in New York State as shown on Exhibit A.

20. Both the federal and state treaties provide that the Oneida Indians are to ask the help of the United States and the State before taking any action on their own. The plaintiffs have asked the help of both the federal and state governments and such help has been refused.

21. It has always been the policy of the Oneida Indians to live in peace and trust and friendship with their neighbors. The plaintiffs bring this action against defendants only because all other avenues of redress have been closed to them.

Wherefore, plaintiffs demand judgment against defendants in the sum of at least TEN THOUSAND DOLLARS ($10,000.00), plus such other and further monetary damages as the Court may deem just.

BOND, SCHOENECK & KING

By _____

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AMENDED COMPLAINT, Filed 7-29-70.

United States District Court

Northern District of New York

THE ONEIDA INDIAN NATION OF NEW YORK STATE, also known as the ONEIDA NATION OF NEW YORK, also known as the ONEIDA INDIANS OF NEW YORK, and THE ONEIDA INDIAN NATION OF WISCONSIN, also known as the ONEIDA TRIBE OF INDIANS OF WISCONSIN, INC.,

Plaintiffs,

-vs-

THE COUNTY OF ONEIDA, NEW YORK and THE COUNTY OF MADISON, NEW YORK,

Defendants.

Civil Action No. 70-CV-35

Plaintiffs hereby amend their complaint in the above entitled action and allege and show as and for an alternate, separate, and distinct cause of action a new paragraph, "22", as follows:

22. Subsequent to the "Treaty" of 1795, part of the premises purportedly deeded to the State and others became occupied by and recorded in the name of the Counties of Oneida and Madison, New York, the defendants herein. The defendants currently occupy parts of said premises for buildings, roads, and other public improvements. By reason of such use and occupancy of plaintiffs' premises, defendants for the period January 1, 1968 through December 31, 1969 became indebted to plaintiffs for the fair

rental value of such premises to the extent of at least $10,000.00, exclusive of costs and interest.

WHEREFORE, plaintiffs demand judgment against defendants in the sum of at least TEN THOUSAND DOLLARS ($10,000.00), plus such other and further monetary damages as the Court may deem just.

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ANSWER OF DEFENDANT COUNTY OF ONEIDA.

United States District Court

Northern District of New York

THE ONEIDA INDIAN NATION OF NEW YORK STATE, also known as the ONEIDA NATION OF NEW YORK, also known as the ONEIDA INDIANS OF NEW YORK, and THE ONEIDA INDIAN NATION OF WISCONSIN, also known as the ONEIDA TRIBE OF INDIANS OF WISCONSIN, INC.,

Plaintiffs,

-vs-

THE COUNTY OF ONEIDA, NEW YORK and THE COUNTY OF MADISON, NEW YORK,

Defendants.

Civil Action No. 70-CV-35

Answer and Affirmative Defense.

Defendant, County of Oneida, New York, as and for an Answer to the Complaint of the plaintiffs, herein states:

1. Defendant lacks knowledge sufficient to form a belief as to the allegations contained in paragraphs "1", "3", "5", "8", "9", "10", "11", "12", "13", "14", "15", "16", "17", "18", "20" and "21" of the complaint, as amended.

2. DENIES the allegations contained in paragraphs "2", "6", "19" and "22" of the complaint, as amended.

3. As to the invocations set forth in paragraph "4" of the amended complaint, defendant lacks knowledge sufficient to form

a belief as to the allegations, except that the County of Oneida admits, upon information and belief, that the treaties, mentioned in the said paragraph, were entered into as therein alleged.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE
DEFENDANT, COUNTY OF ONEIDA, ALLEGES:

4. The cause of action herein accrued more than six years prior to the commencement of this action and is therefore barred by the statute of limitations.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE
DEFENDANT, COUNTY OF ONEIDA, ALLEGES:

5. Plaintiffs had notice of all of the facts and all of the acts of the defendant set forth in the complaint since 1795 but nevertheless refrained from commencing this action until 1970 so that the plaintiffs are guilty of such laches as should in equity bar the plaintiffs from maintaining this action.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE
DEFENDANT, COUNTY OF ONEIDA, ALLEGES:

6. The defendant, County of Oneida, has acquired title to the premises involved herein by adverse possession.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE
DEFENDANT, COUNTY OF ONEIDA, ALLEGES:

7. The defendant County of Oneida is a bona fide purchaser for value of said premises without notice of any adverse rights of others.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE
DEFENDANT, COUNTY OF ONEIDA, ALLEGES:

8. None of the acts set forth in the complaint which form the basis of the action were committed by defendant, County of Oneida, and accordingly, it is not subject to liability in this action.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE
DEFENDANT, COUNTY OF ONEIDA, ALLEGES:

9. The plaintiffs at the times mentioned in the complaint did not own a fee title to the said premises since title was then vested in the State of New York by virtue of its status as a sovereign state. The plaintiffs had a right of occupancy only and, therefore, the price paid under the treaty for the purchase of such rights was adequate in the premises.

AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE
DEFENDANT, COUNTY OF ONEIDA, ALLEGES:

10. The plaintiffs could have asserted the claims now being made for the past 179 years since the Supreme Court found jurisdiction based on a Federal treaty; plaintiffs, instead, appear to have abandoned the lands in question, and, at the very least, have slept on their rights.

AS AND FOR AN EIGHTH AFFIRMATIVE DEFENSE
DEFENDANT, COUNTY OF ONEIDA ALLEGES:

11. That this issue is presently before the United States Indian Claims Commission.

AS AND FOR A NINTH AFFIRMATIVE DEFENSE
DEFENDANT, COUNTY OF ONEIDA, ALLEGES:

12. The County of Oneida, as a political division of the State of New York has not waived its immunity from suit.

AS AND FOR A TENTH AFFIRMATIVE DEFENSE
DEFENDANT, COUNTY OF ONEIDA, ALLEGES:

13. There is no enabling act passed by the Legislature which permits this action to be maintained by the plaintiffs.

AS AND FOR AN ELEVENTH AFFIRMATIVE DEFENSE
DEFENDANT, COUNTY OF ONEIDA ALLEGES:

14. The plaintiffs have not complied with the requirements of the County Law and General Municipal Law of the State of New York as to the requirements of giving notice of claim and commencing an action thereon within one year and 90 days after the event upon which the claim is based.

AS AND FOR A TWELFTH AFFIRMATIVE DEFENSE
DEFENDANT, COUNTY OF ONEIDA, ALLEGES:

15. The plaintiffs' Indian tribes are not competent to sue in Federal Courts or in any Court since under the laws of the United States of America they can do so only through suit instituted in their behalf by the United States Government.

AS AND FOR A THIRTEENTH AFFIRMATIVE DEFENSE
DEFENDANT, COUNTY OF ONEIDA, ALLEGES:

16. Defendant, County of Oneida, is not a proper party to defend this action.

AS AND FOR A FOURTEENTH AFFIRMATIVE DEFENSE
DEFENDANT, COUNTY OF ONEIDA, ALLEGES:

17. This action is premature in that the plaintiffs have failed to exhaust the remedies which they are required to pursue before being entitled to institute the present action.

AS AND FOR A FIFTEENTH AFFIRMATIVE DEFENSE
DEFENDANT, COUNTY OF ONEIDA, ALLEGES:

18. That the plaintiffs have failed to join all the parties who have an interest in this proceeding and whose presence is necessary in order that any judgment entered herein would dispose of all the issues and be binding and effective.

WHEREFORE, defendant, County of Oneida, demands judgment dismissing the amended complaint of the plaintiffs, together with costs and disbursements of this action.

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THIRD PARTY COMPLAINT OF COUNTY OF ONEIDA

United States District Court

Northern District of New York

THE ONEIDA INDIAN NATION OF NEW YORK STATE, also known as the ONEIDA NATION OF NEW YORK, also known as the ONEIDA INDIANS OF NEW YORK, and THE ONEIDA INDIAN NATION OF WISCONSIN, also known as the ONEIDA TRIBE OF INDIANS OF WISCONSIN, INC.,

Plaintiffs,

-vs-

THE COUNTY OF ONEIDA, NEW YORK and THE COUNTY OF MADISON, NEW YORK,

Defendants.

COUNTY OF ONEIDA, NEW YORK,

Defendant and
Third Party Plaintiff,

-vs-

STATE OF NEW YORK,

Third Party Defendant.

Index No. 70-CV-35

Third Party Complaint

Defendant, County of Oneida, as and for its third party complaint, against the State of New York, alleges as follows:

1. The County of Oneida is a municipal corporation organized and existing under the laws of the State of New York with its principal office and place of business located at 800 Park Avenue, Utica, New York.

2. The State of New York is a sovereign state and conducts its business through the various political sub-divisions of the State of New York, including the County of Oneida.

3. Plaintiffs' allege in their complaint that the State of New York purchased from plaintiffs, contrary to Federal law, 300,000 acres of land, part of which lands are situate in the County of Oneida.

4. It is further alleged in the complaint herein that a portion of the land so purchased by the State of New York was subsequently ceded to the County of Oneida by the State of New York.

5. That if in fact such land was ceded, given, transferred or otherwise entrusted to the County of Oneida by the State of New York, it was done solely for the benefit of the State of New York in furtherance of the sovereign powers and interests of the State of New York, to be administrated by its agent, the County of Oneida, pursuant to the laws of the State of New York.

6. If the defendant, County of Oneida, is held responsible for the damages sustained by the plaintiffs herein such liability shall have been brought about and caused wholly and solely by the State of New York, its agents, servants and employees without any fault or liability of the defendant, County of Oneida, in any manner whatsoever.

WHEREFORE, defendant and third party plaintiff demands judgment against the third party defendant for any amounts re-

covered against it by the plaintiffs, together with the costs and disbursements of this action.

DONALD E. KEINZ, County Attorney
James P. O'Rourke, of Counsel
Rocco S. Mascaro, of Counsel
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THIRD PARTY COMPLAINT OF COUNTY OF MADISON

United States District Court

Northern District of New York

THE ONEIDA INDIAN NATION OF NEW YORK STATE, also known as the ONEIDA NATION OF NEW YORK, also known as the ONEIDA INDIANS OF NEW YORK, and THE ONEIDA INDIAN NATION OF WISCONSIN, also known as the ONEIDA TRIBE OF INDIANS OF WISCONSIN, INC.,

Plaintiffs,

-vs-

THE COUNTY OF ONEIDA, NEW YORK and THE COUNTY OF MADISON, NEW YORK,

Defendants.

Index No. 70-CV-35

Third Party Complaint

Defendant, County of Madison, as and for its third party complaint, against the State of New York, alleges as follows:

1. The County of Madison is a municipal corporation organized and existing under the laws of the State of New York with its principal office and place of business located at Madison County Office Building, Wampsville, New York.

2. The State of New York is a sovereign state and conducts its business through the various political sub-divisions of the State of New York, including the County of Madison.

3. Plaintiffs' allege in their complaint that the State of New York purchased from plaintiffs, contrary to Federal law, 300,000 acres of land, part of which lands are situate in the County of Madison.

4. It is further alleged in the complaint herein that a portion of the land so purchased by the State of New York was subsequently ceded to the County of Madison by the State of New York.

5. That if in fact such land was ceded, given, transferred or otherwise entrusted to the County of Madison by the State of New York, it was done solely for the benefit of the State of New York in furtherance of the sovereign powers and interests of the State of New York, to be administrated by its agent, the County of Madison, pursuant to the laws of the State of New York.

6. If the defendant, County of Madison, is held responsible for the damages sustained by the plaintiffs herein such liability shall have been brought about and caused wholly and solely by the State of New York, its agents, servants and employees without any fault or liability of the defendant, County of Madison, in any manner whatsoever.

WHEREFORE, defendant and third party plaintiff demands judgment against the third party defendant for any amounts recovered against it by the plaintiffs, together with the costs and disbursements of this action.

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United States District Court

Northern District of New York

THE ONEIDA INDIAN NATION OF NEW YORK STATE, also known as the ONEIDA NATION OF NEW YORK, also known as the ONEIDA INDIANS OF NEW YORK, and THE ONEIDA INDIAN NATION OF WISCONSIN, also known as the ONEIDA TRIBE OF INDIANS OF WISCONSIN, INC.,

Plaintiffs,

-vs-

THE COUNTY OF ONEIDA, NEW YORK and THE COUNTY OF MADISON, NEW YORK,

Defendants.

Civil Action No. 70-CV-35

Answer and Affirmative Defense.

Defendant, County of Madison, New York, as and for an Answer to the Complaint of the plaintiffs, herein states:

1. Defendant lacks knowledge sufficient to form a belief as to the allegations contained in paragraphs "1", "3", "5", "8", "9", "10", "11", "12", "13", "14", "15", "16", "17", "18", "20" and "21" of the complaint, as amended.

2. DENIES the allegations contained in paragraphs "2", "6", "19" and "22" of the complaint, as amended.

3. As to the invocations set forth in paragraph "4" of the amended complaint, defendant lacks knowledge sufficient to form a belief as to the allegations, except that the County of Madison

admits, upon information and belief, that the treaties, mentioned in the said paragraph, were entered into as therein alleged.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE
DEFENDANT, COUNTY OF MADISON, ALLEGES:

4. The cause of action herein accrued more than six years prior to the commencement of this action and is therefore barred by the statute of limitations.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE
DEFENDANT, COUNTY OF MADISON, ALLEGES:

5. Plaintiffs had notice of all of the facts and all of the acts of the defendant set forth in the complaint since 1795 but nevertheless refrained from commencing this action until 1970 so that the plaintiffs are guilty of such laches as should in equity bar the plaintiffs from maintaining this action.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE
DEFENDANT, COUNTY OF MADISON, ALLEGES:

6. The defendant, County of Madison, has acquired title to the premises involved herein by adverse possession.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE
DEFENDANT, COUNTY OF MADISON, ALLEGES:

7. The defendant County of Madison is a bona fide purchaser for value of said premises without notice of any adverse rights of others.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE
DEFENDANT, COUNTY OF MADISON, ALLEGES:

8. None of the acts set forth in the complaint which form the basis of the action were committed by defendant, County of Madison, and accordingly, it is not subject to liability in this action.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE
DEFENDANT, COUNTY OF MADISON, ALLEGES:

9. The plaintiffs at the times mentioned in the complaint did not own a fee title to the said premises since title was then vested in the State of New York by virtue of its status as a sovereign state. The plaintiffs had a right of occupancy only and, therefore, the price paid under the treaty for the purchase of such rights was adequate in the premises.

AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE
DEFENDANT, COUNTY OF MADISON, ALLEGES:

10. The plaintiffs could have asserted the claims now being made for the past 179 years since the Supreme Court found jurisdiction based on a Federal treaty; plaintiffs, instead, appear to have abandoned the lands in question, and, at the very least, have slept on their rights.

AS AND FOR AN EIGHTH AFFIRMATIVE DEFENSE
DEFENDANT, COUNTY OF MADISON, ALLEGES:

11. That this issue is presently before the United States Indian Claims Commission.

AS AND FOR A NINTH AFFIRMATIVE DEFENSE
DEFENDANT, COUNTY OF MADISON, ALLEGES:

12. The County of Madison, as a political division of the State of New York has not waived its immunity from suit.

AS AND FOR A TENTH AFFIRMATIVE DEFENSE
DEFENDANT, COUNTY OF MADISON, ALLEGES:

13. There is no enabling act passed by the Legislature which permits this action to be maintained by the plaintiffs.

AS AND FOR AN ELEVENTH AFFIRMATIVE DEFENSE
DEFENDANT, COUNTY OF MADISON, ALLEGES:

14. The plaintiffs have not complied with the requirements of the County Law and General Municipal Law of the State of New York as to the requirements of giving notice of claim and commencing an action thereon within one year and 90 days after the event upon which the claim is based.

AS AND FOR A TWELFTH AFFIRMATIVE DEFENSE
DEFENDANT, COUNTY OF MADISON, ALLEGES:

15. The plaintiffs' Indian tribes are not competent to sue in Federal Courts or in any Court since under the laws of the United States of America they can do so only through suit instituted in their behalf by the United States Government.

AS AND FOR A THIRTEENTH AFFIRMATIVE DEFENSE
DEFENDANT, COUNTY OF MADISON, ALLEGES:

16. Defendant, County of Madison, is not a proper party to defend this action.

AS AND FOR A FOURTEENTH AFFIRMATIVE DEFENSE
DEFENDANT, COUNTY OF MADISON, ALLEGES:

17. This action is premature in that the plaintiffs have failed to exhaust the remedies which they are required to pursue before being entitled to institute the present action.

AS AND FOR A FIFTEENTH AFFIRMATIVE DEFENSE
DEFENDANT, COUNTY OF MADISON, ALLEGES:

18. That the plaintiffs have failed to join all the parties who have an interest in this proceeding and whose presence is necessary in order that any judgment entered herein would dispose of all the issues and be binding and effective.

WHEREFORE, defendant, County of Madison, demands judgment dismissing the amended complaint of the plaintiffs, together with costs and disbursements of this action.

WILLIAM L. BURKE, ESQ.
Madison County Attorney
Attorney for Defendant,
County of Madison
Office and P.O. Address:
29 Lebanon Street
Hamilton, New York 13346
Tel: (315) 824-3550

TREATY OF CANANDAIGUA, NOVEMBER 11, 1794, 7 STAT. 44

A Treaty between the United States of America, and the Tribes of Indians called the Six Nations.

The President of the United States having determined to hold a conference with the Six Nations of Indians, for the purpose of removing from their minds all causes of complaint, and establishing a firm and permanent friendship with them; and Timothy Pickering being appointed sole agent for that purpose; and the agent having met and conferred with the Sachems, Chiefs and Warriors of the Six Nations, in a general council: Now, in order to accomplish the good design of this conference, the parties have agreed on the following articles; which, when ratified by the President, with the advice and consent of the Senate of the United States, shall be binding on them and the Six Nations.

Article I.

Peace and friendship are hereby firmly established, and shall be perpetual, between the United States and the Six Nations.

Article II.

The United States acknowledge the lands reserved to the Oneida, Onondaga and Cayuga Nations, in their respective treaties with the state of New York, and called their reservations, to be their property; and the United States will never claim the same, nor disturb them or either of the Six Nations, nor their Indian friends residing thereon and united with them, in the free use and enjoyment thereof; but the said reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.

• • •

Article IV.

The United States having thus described and acknowledged what lands belong to the Oneidas, Onondagas, Cayugas and Senekas, and engaged never to claim the same, nor to disturb them, or any of the Six Nations, or their Indian friends residing thereon and united with them, in the free use and enjoyment thereof: Now, the Six Nations, and each of them, hereby engage that they will never claim any other lands within the boundaries of the United States; nor even disturb the people of the United States in the free use and enjoyment thereof.

• • •

Article VI.

In consideration of the peace and friendship hereby established, and of the engagements entered into by the Six Nations: and because the United States desire, with humanity and kindness, to contribute to their comfortable support; and to render the peace and friendship hereby established, strong and perpetual; the United States now deliver to the Six Nations, and the Indians of the other nations residing among and united with them, a quantity of goods of the value of ten thousand dollars. And for the same considerations, and with a view to promote the future welfare of the Six Nations, and of their Indian friends aforesaid, the United States will add the sum of three thousand dollars to the one thousand five hundred dollars, heretofore allowed them by an article ratified by the President, on the twenty-third day of April, 1792; making in the whole, four thousand five hundred dollars; which shall be expended yearly forever, in purchasing clothing, domestic animals, implements of husbandry, and other utensils suited to their circumstances, and in compensating useful artificers,

who shall reside with or near them, and be employed for their benefit. The immediate application of the whole annual allowance now stipulated to be made by the superintendent appointed by the President for the affairs of the Six Nations, and their Indian friends aforesaid.

Article VII.

Lest the firm peace and friendship now established should be interrupted by the misconduct of individuals, the United States and Six Nations agree, that for injuries done by individuals on either side, no private revenge or retaliation shall take place, but, instead thereof, complaint shall be made by the party injured, to the other: By the Six Nations or any of them, to the President of the United States, or the Superintendent by him appointed: and by the Superintendent, or other person appointed by the President, to the principal chiefs of the Six Nations, or of the nation to which the offender belongs: and such prudent measures shall then be pursued as shall be necessary to preserve our peace and friendship unbroken; until the legislature (or great council) of the United States shall make other equitable provision for the purpose.

NOTE. It is clearly understood by the parties to this treaty, that the annuity stipulated in the sixth article, is to be applied to the benefit of such of the Six Nations and of their Indian friends united with them as aforesaid, as do or shall reside within the boundaries of the United States: For the United States do not interfere with nations, tribes or families, of Indians elsewhere resident.

In witness whereof, the said Timothy Pickering, and the sachems and war chiefs of the said Six Nations, have hereto set their hands and seals.

Done at Konondaigua, in the State of New York, the eleventh day of November, in the year one thousand seven hundred and ninety-four. [There follows a series of signatures.]

TREATY OF SEPTEMBER 15, 1795

This Indenture made the fifteenth day of September One thousand seven hundred and ninety five Between the Sachems, Warriors and Women of the Oneida Nation of Indians by Jacob Reed, Peter Bread; Thomas Whitebeans & others whose names are hereunto subscribed as Deputies and attornies authorized and empowered for that purpose by a certain Instrument in writing under the hands and seals of said Sachems, Warriors and Women of the said Nation bearing date the first day of September instant of the first part and Philip Schuyler, John Cantine and David Brooks Agents in behalf of the people of the State of New York duly authorized and empowered by an act of the Legislature of the said State passed the 9th day of April, 1795 of the second part:

WHEREAS at a Treaty held at Fort Schuyler in the County of Herkimer on the twenty second day of September One thousand seven hundred and eighty eight between the said parties of the first part and certain commissioners duly authorized and empowered in behalf of the State aforesaid, certain Tracts of Land in the said Treaty particularly specified and described were appropriated and set apart for the use, benefit and behoof of the aforesaid Tribe or Nation of Indians, and

WHEREAS the said Tribe or Nation of Indians have requested of the Legislature of the said State to render a part of the Lands so appropriated and set apart productive of an annual income to them. Now Therefore this Indenture Witnesseth That the said parties of the first part for and in consideration of the sums of money and other stipulations hereinafter mentioned to be paid done and performed by and on the part of the said people of the State aforesaid Have granted, bargained, sold, aliened, remised, transferred, set over, released and confirmed and by these presents Do grant bargain, sell, alien, remise, transfer, set over, release & confirm unto

the said people of the State aforesaid so much of the Lands and set apart in manner aforesaid as is contained within the limits and bounds following to wit: Beginning at a place on the East Bank of the Oneida Lake which place is a bisection of the distance between the mouth of Wood Creek and the mouth of the Oneida Creek, and runs from the said place of bisection Northerly along the Waters of the Oneida Lake to Wood Creek, thence up along Wood Creek until opposite Canada Creek being the North East corner of the Lands appropriated to the use of the said Tribe or Nation of Indians in the Treaty aforesaid Thence along the Eastern Boundary lines of the Lands so appropriated to the South East corner thereof, thence West along the Southern Boundary thereof to the South West corner thereof, thence North along the Western Boundary thereof to the Deep Spring, thence Easterly by the boundary expressed in the said Treaty to the Chittilingo Branch of Canassaderaga Creek thence Southerly along the said Branch so far as to be One mile distant from the Northern Boundary of the Tract of Land leased by the said Tribe or Nation to Peter Smith, thence East by a Line parallel to the said Northern Boundary so far as to a point four miles distant from the Eastern boundary of the Tract so appropriated as aforesaid thence Northerly by strait lines parallel to the Eastern boundary lines of the Lands so appropriated and Keeping four miles distant therefrom until it reaches a place four miles distant from Wood Creek, thence with a strait line to the place of beginning. Excepting thereout so much of the Lands granted to the Stockbridge Indians as is included within the bounds aforesaid; and also Excepting thereout one mile square to include a small settlement of the said Tribe or Nation on the East side of the Lands granted to the Stockbridge Indians; and also all the Lands lying on the North side of the Oneida Lake appropriated and set apart to the use benefit and behoof of the said Nation of Indians at the Treaty aforesaid, and also the Land at

the fishing place in the Onondaga River mentioned in the Treaty aforesaid. To have and to hold all and singular the Lands aforesaid to the people of the State of New York aforesaid for Ever. On condition nevertheless That the said people aforesaid shall immediately on the Execution and Delivery of this Indenture by the said parties of the first part pay to the said Indians the sum of Two thousand nine hundred and Fifty two dollars and annually forever thereafter on the first day of June in each year the like sum of Two thousand nine hundred & fifty two Dollars, at Oneida in the county of Herkimer together with the sum of Six hundred Dollars stipulated by the Treaty aforesaid to be paid to the said Indians; and

WHEREAS Doubts have arisen whether the Tract of Land lying between the Streams known by the name of the Chellingo and the Canaseraga Creeks was intended by the Treaty aforesaid to be included within the limits of the Lands so appropriated and set apart for the aforesaid Indians or not; The parties aforesaid Do by these presents mutually agree That if the Legislature of the State aforesaid shall Quit-claim to the said Indian Tribe or Nation the Lands between the said Streams as far South as an Easterly line from the Deep Spring to the Easternmost of the said Streams, to be drawn by the shortest distance between the said Spring and the said Easternmost Stream, and as far North as the junction of the said two Streams, That then and in that case the said tribe or Nation of Indians shall and they Do by these presents grant, bargain, sell, alien and release to the people of the State of New York aforesaid All that certain Tract of Land within the limits and bounds following Viz: Beginning at the East end of the Oak ridge in the great Road leading from the Oneida Village to the Deep Spring, and runs thence South to the North Bounds of this Tract herein before described as released to the people of this State, thence East along the said North bounds two miles, thence North to the East side of the said Road, thence North

one half Mile thence with a strait line parallel to the General course of that part of the said Road between the East and West Bounds of this Tract until the place of beginning bears South thence South to the place of beginning. Provided always and it is the true intent of these presents that the said Tract shall be surveyed at the expence of the people of the said State, and the quantity of acres contained therein determined, and that for every hundred acres contained therein there shall be annually paid by the people of the State of New York the sum of three Dollars the first payment to be made on the said first day of June next, and a like Sum annually forever thereafter on the first day of June in each Year at Oneida aforesaid; but in case the Legislature of the said State shall not Quit claim the Lands between the said Streams as last aforesaid that then and in that case the Lands described in this article as ceded to the said people shall be and remain to the said Tribe or Nation of Indians; as if this article had never been made and concluded upon anything herein contained to the contrary notwithstanding; and

WHEREAS there was appropriated and set apart to the use, benefit and behoof of the said Tribe or Nation of Indians by the Treaty aforesaid one half mile of Land on each side of Fish Creek; and

WHEREAS the said tribe or Nation of Indians incline to sell so much of the said Lands as lay to the Northward of a certain Creek falling into the said fish Creek, and coming from towards Fort Schuyler; and

WHEREAS it is not possible without a previous Survey to determine the quantity of Lands which they so incline to sell nor the junction of the Creek beyond which the said Tribe or Nation of Indians incline to sell The parties aforesaid Do therefore further mutually agree by these presents, That whenever the quantity of Land comprized within the last mentioned bounds shall be ascertained and the Legislature of the said

State shall determine to purchase the same and pass an act for that purpose that then and in that case the said Tribe or Nation of Indians shall be and hereby are bound to convey and release the same to the people of the State of New York aforesaid; provided that the said people shall annually forever thereafter pay unto the said Tribe or Nation of Indians at and after the rate of three Dollars per annum for every hundred acres contained n the said last mentioned Tract of Land provided always and it is the true intent and meaning of these presents that the said parties of the first part shall when thereunto required assign, transfer, and set over to the aforesaid people the Lease by them heretofore given to Peter Smith or part of the Lands herein first above mentioned.

In Witness Whereof the parties to these presents have hereunto interchangeably set their hands and seals the day and year first herein before first above written

[There follows a series of signatures.]

TREATY OF JUNE 1, 1798

At a Treaty held with the Oneida Nation or Tribe of Indians at their Village in the State of New York on the first Day of June in the Year One Thousand Seven Hundred and Ninety Eight.

PRESENT, Joseph Hopkinson Commissioner appointed under the authority of the United States to hold the Treaty Egbert Benson Ezra L'Hommedieu and John Tayler Agents for the State of New York .....

The said Indians having in the month of March last Proposed to the Goveronor [sic] of the said State to cede the Lands herein after described, for the compensation herein after mentioned — and the said Governor having acceded to the said Proposal, and advanced to the said Indians, at their desire in part Payment of the said Compensation Three Hundred Dollars to answer their then immediate occasions the said cession is thereupon in the presence and with the approbation of the said Commissioner carried into effect at this Treaty, which hath on the request of the said Governor been appointed to be held for the purpose as follows, that is to say, the said Indians do cede release and quit claim to the People of the State of New York forever All the Lands within their Reservation to the Westward and Southwestward of a Line from the Northeastern corner of Lot No. 54 in the last purchase from them running northerly to a button wood tree marked on the east side Oneida R 1798 On the West side FP. S. 1798. and on the South side with three Notches and a blaze standing on the bank of the Oneida Lake in the Southern part of a Bay called Newageghkoo Also a Mile on each side of the Main Genesee Road for the distance of one mile and an half westward to commence at the Eastern boundary of their said Reservation — And also the same Breadth for the distance of three miles

on the south side and of one mile on the north side of the said Road Eastward to commence at the Eastern Boundary of the said Lot No. 54, Provided and excepted nevertheless that the following Indian Families Viz: Sarah Docksteder, Jacob Docksteder, Cornelius Docksteder Lewis Denny John Denny, Jan Joost and Nicholas shall be suffered to possess of the Tract First above mentioned. The Grounds cultivated by them respectively and their improvements not exceeding Fifty Acres to each Family so long as they shall reside there — And in consideration of this Proviso and Exception the said Indians do further Cede that a tract of Twelve Hundred and Eighty Acres, as Follows— that is to say Beginning in the South east Corner of Lot No. 59, in the said last Purchase and running thence East one Mile, thence North two Miles thence West One Mile and thence South Two Miles shall be considered as set Apart by the said Nation or Tribe for the use of the said Families whenever they shall remove from where they now reside, The Said Agents do for the People of the said State pay to the said Indians in addition to the said sum of Three Hundred dollars already advanced to them as above mentioned the further sum of Two Hundred Dollars, And do grant to the said Indians that the People of the said State shall pay to the said Indians at their said Village on the First day of June next and on the first day of June Yearly thereafter the Annual Sum of Seven Hundred Dollars.

In Testimony whereof the said Commissioner, the said Agents and the said Indians have hereunto and to other Acts of the same Tenor and date the One to remain with the United States another to remain with the State of New York and another to remain with the said Indians set their hands and Seals at the Village Aforesaid the Day and Year first above written.

[There follows a series of signatures.]

TREATY OF JUNE 4, 1802

At a Treaty held with the Oneida Nation or Tribe of Indians at their Village in the State of New York, on the fourth day of June in the year of our Lord One Thousand eight Hundred and Two

Present John Tayler Agent appointed under the authority of the United States to hold the Treaty, and Ezra L'Hommedieu and Simeon DeWitt Agents for the State of New York.

The said Indians having by their Sachems Chiefs and Warriors in the month of March last proposed to the Governor of the said State to cede the Lands hereinafter described for the compensation hereinafter mentioned And the said Governor together with the Surveyor General of the said State and Ezra L'Hommedieu Esquire an Agent appointed by the said Governor pursuant to concurrent resolutions of the Senate and Assembly of the State bearing date the 23d and 24 days of February last, having acceded to the proposal of the said Sachems Chiefs and Warriors, and on the fifth day of the said month of March executed a provisional agreement with them for the cession and purchase of the same, and advanced to them at their desire in part payment of the said Compensation three Hundred dollars, to answer the immediate Occasions of the said Indians — The said Cession is thereupon in the presence and with the approbation of the said Commissioner carried into effect at this Treaty which hath on the request of the said Governor been appointed to be held for the purpose, as follows, that is to say, The said Indians do Cede release and quit claim to the people of the State of New York forever the several Tracts or parcels of Land hereinafter described, being parts of the lands heretofore reserved to the said Oneida Nation of Indians To wit, All that certain Tract of Land beginning at the Southwest corner of the Land lying along the Genesee Road, and which was ceded in the year One thousand Seven hundred

and Ninety eight by the said Oneida Indians to the people of the State of New York, and running thence along the last mentioned Tract, easterly to the southeast corner thereof thence southerly in the direction of the continuation of the east bounds of said last mentioned tract, to other lands heretofore ceded by the said Oneida Nation of Indians to the people of the State of New York then along the same westerly to a part of said last mentioned Land called the Two-mile strip, and then along the same northerly to the place of Beginning — Also, another Tract of Land bounded on the south by the Genesee Road, on the North by a Line drawn parallel to said Road — and at the Distance on an average of half a mile to the northward thereof, and extending from the West bounds of a tract of One hundred Acres now ceded and including Myndert Van Eps Wemples house westerly to the Lands heretofore ceded as aforesaid. Provided that the north bounds of the last described tract shall be run with such right Angular offsets as to leave the Indian Houses near the northwesterly corner of said Tract, Twenty chains distant from the same — Also, One Hundred Acres to be laid out in a square and to extend each way from the house of said Myndert Van Eps Wemple along the said Genesee Road fifteen chains and northerly from said Road fourteen chains and Southerly from said road twenty chains Also all that part of the land heretofore reserved by the said Oneida nation of Indians along the Fish Creek which lies to the northward of the Bridge over said Creek commonly called and known by the name of Bloomfields Bridge. The said Agents do for the people of the State of New York in conformity to the said provisional agreement pay to the said Indians in addition to the said sum of Three Hundred Dollars already advanced to them as above mentioned the further sum of Six Hundred Dollars, and do grant to the said Indians that the People of the said State shall annually forever hereafter on such day and place as are or shall be appointed for the Pay-

ment of other Annuities to the said Indians pay to the said Indians the sum of Three hundred Dollars. And the said Agents do further grant to the said Indians that the People of the State of New York, out of the lands above described and hereby ceded to them shall grant to Sarah Docksteder One Hundred Acres to be laid out in a square adjoining the Two-Mile Tract, on the Road commonly called Klocks, Road, as the said One Hundred Acres shall be laid out by order of the Surveyor General with the approbation of the said Sarah, to be held to her during her natural life and thereafter to her heirs in fee. And ALSO to Michael Kern One Hundred and fifty Acres, so as to include the House in which he now resides with the other improvements made by him around the Same.

In Testimony whereof the said commissioner the said Agents and the said Indians have hereunto and to other Acts of the same tenor and date the one to remain with the United States another to remain with the State of New York and another to remain with the said Indians, set their hands and seals at the Village aforesaid the day and year first above written.

[There follows a series of signatures.]

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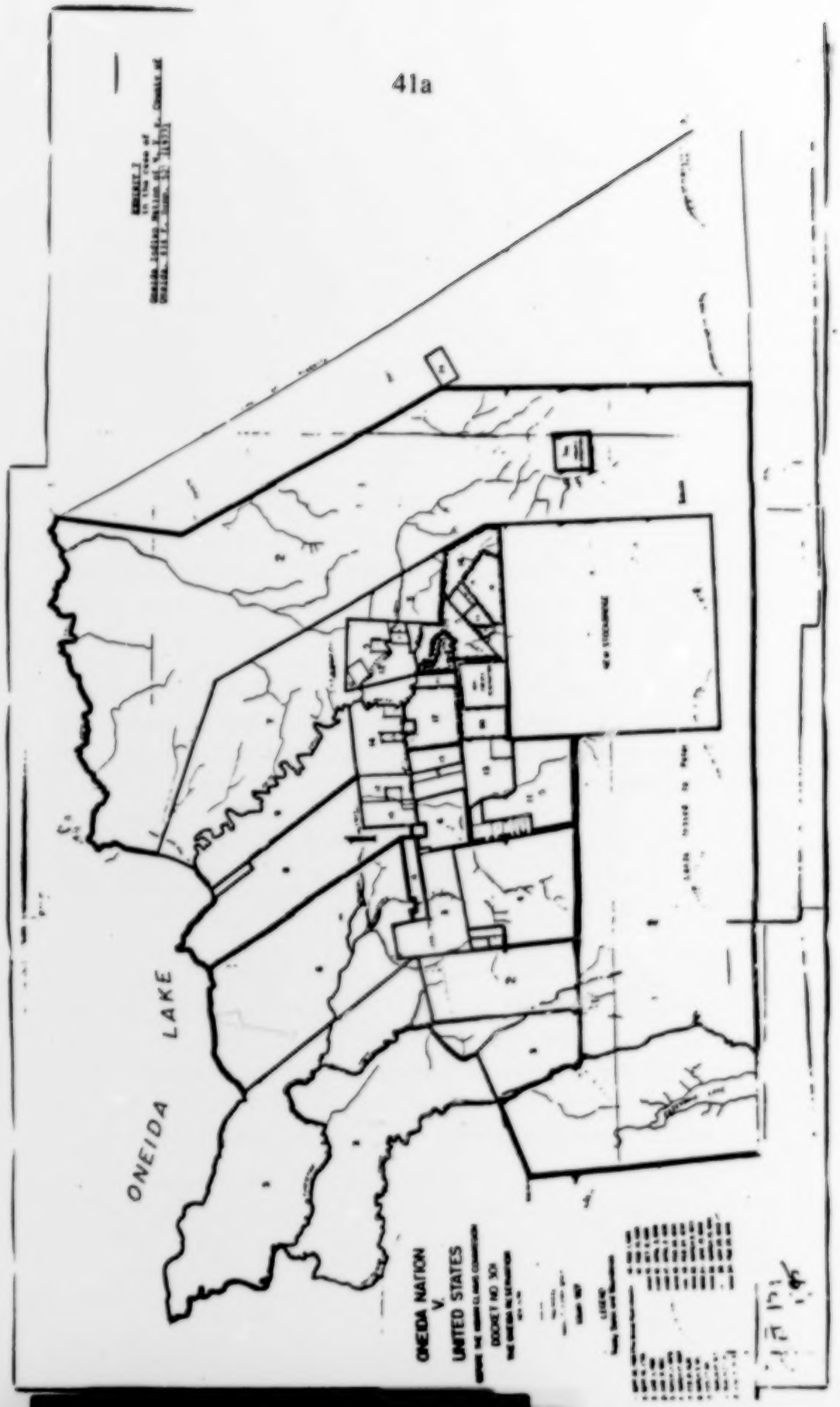

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
WASHINGTON, D.C. 20242

March 15, 1968

Mr. Jacob Thompson
President, Oneida Indian Nation of New York
RD 1, Route 11A
Nedrow, New York

Dear Mr. Thompson:

Consideration has been given to the petition submitted to the President of the United States by you on February 9th in behalf of the Oneida Nation of Indians of New York.

The petition requests the assistance of the United States in the prosecution of a claim against the State of New York for the allegedly wrongful taking of Oneida lands during the period from 1788 to 1842.

The petition is based on Articles II and VII of the Treaty of Canandaigua (7 Stat. 44), entered into by the United States and the Six Nations on November 11, 1894, which provides:

> The United States acknowledge the lands reserved to the Oneida, Onondaga, and Cayuga Nations in their respective treaties with the State of New York, called their reservations, to be their property . . . said reservations shall remain theirs until they choose to sell the same to the people of the United States, who have the right to purchase. (Article II)
>
> Lest the firm peace and friendship now established should be interrupted by the misconduct of individuals, the United States and Six Nations agree, that for injuries done by individuals on either side . . . complaint shall be made by the party injured, to the other; by the Six Nations or any of them, to the President of the United States, or the Superintendent by him appointed . . . and such prudent measures shall then be pursued as shall be necessary to preserve our peace and friendship unbroken; until the legislature (or great council) of the United States shall make other equitable provision for the purpose. (Article VII)

The Oneidas claim they have lost all but approximately 32 acres of their original 4,000,000—6,000,000 acre holdings in New York as the result of a series of sales to the State, all of which were for insufficient consideration or in violation of the Trade and Intercourse Act of July 22, 1790, 1 Stat. 44 (25 U.S.C. 177), or both.

The instant petition is actually the second request of its kind received by the United States from the Oneida Nation. The first was contained in a letter to the Interior Department dated June 5, 1967, a copy of which is attached, from Bond, Schoeneck & King, a Syracuse firm retained by the Oneidas to prepare and prosecute tribal claims against the State of New York under Special Contract 8 KC-1420-C-002, approved by the Assistant Secretary on March 28, 1967. Bond, Schoeneck & King also prepared the memorandum of law and fact which accompanies the present petition.

The Oneidas have a claim currently pending before the Indian Claims Commission for the very injuries presently complained of. A petition, designated Docket No. 301, was filed on August 10, 1951, by Aaron, Schinberg & Hess, who are retained as claims counsel for the Oneida Nation under Contract No. I-1-Ind-42421, approved by the Commissioner of Indian Affairs on

November 8, 1950, which asks judgment against the United States for the fair market value of Oneida lands sold to the State of New York between 1788 and 1946. Trial has been scheduled for February 4, 1970.

Since the United States has provided a forum for determining whether the Oneidas should be compensated for injuries sustained as a result of their eighteenth and nineteenth century dealings with the State of New York, no further government action on these claims seems necessary.

If you have any further questions, please feel free to write to us again.

It was a pleasure to see you last month when you were here to present the petition, and to talk with you over the telephone since then.

With all good wishes to you, I am,

Sincerely yours,

Robert L. Bennett
Commissioner of Indian Affairs

Enclosure

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

The ONEIDA INDIAN NATION OF NEW YORK STATE, also known as the Oneida Nation of New York, also known as the Oneida Indians of New York, and the Oneida Indian Nation of Wisconsin, also known as the Oneida Tribe of Indians of Wisconsin, Inc., and the Oneida of the Thames Band Council, Plaintiffs, v. The COUNTY OF ONEIDA, New York, and the County of Madison, New York, Defendants.	No. 70-CV-35

MEMORANDUM-DECISION AND ORDER [AND JUDGMENT] [OF JULY 12, 1977]
[434 F.2d 527 (N.D. N.Y. 1977)]

PORT, Senior District Judge.

This case tests the consequences of the failure of the State of New York to comply with the provisions of the Indian Nonintercourse Act, enacted by the first Congres in 1790 and reenacted in substance by subsequent Congresses to the present

date. 25 U.S.C. § 177. Familiarity with the prior opinions in the case is assumed.[1]

In 1795, the State of New York acquired from the Oneida Indians, by an instrument variously denominated as a deed or treaty, 100,000 acres in Central New York. The counties of Oneida and Madison have acquired and now occupy undesignated but small portions of that acreage. The claim made in this case is limited to damages for the use and occupancy during the years 1968 and 1969 of those "parts of said premises [currently occupied by defendants] for buildings, roads, and other public improvements."[2]

The issues can be summed up as follows: (1) Have the plaintiffs established that the transfer of land by the 1795 treaty to the State of New York was in violation of the Nonintercourse Act? (2) Have any of the defenses asserted by the defendants been established? (3) Are the defendants liable to the plaintiffs for damages resulting from defendants' use and occupancy of part of the subject land during 1968 and 1969? The answer to the first question is yes; to the second, no; and to the third, yes.

Although the present owners of the 100,000 acres may have acted in good faith when acquiring their property, such good faith will not render good a title otherwise not valid for failure to comply with the Nonintercourse Act.

> Although it may appear harsh to condemn an apparently good-faith use as a trespass after 90 years of acquiescence by the owners, we conclude that an even older policy of Indian law compels this result.

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[1] *Oneida Indian Nation v. County of Oneida*, 70-CV-35 (N.D.N.Y. November 9, 1971), *aff'd*, 464 F.2d 916 (2d Cir. 1972), *rev'd*, 414 U.S. 661, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974).

[2] Plaintiffs' amended complaint ¶ 22.

United States v. Southern Pacific Transportation Co., 543 F.2d 676, 699 (9th Cir. 1976). Furthermore, it is incumbent upon "[g]reat nations, like great men, [to] keep their word." *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 142, 80 S.Ct. 543, 567, 4 L.Ed.2d 584 (1960) (Black, J., dissenting).

The posture in which this case has been presented is reminiscent of *United States v. Forness*, 125 F.2d 928 (2d Cir.), *cert. denied*, 316 U.S. 694, 62 S.Ct. 1293, 86 L.Ed. 1764 (1942), in which the Second Circuit said:

> Although there is directly before us only one lease, on which the annual rent is but $4, the question is of greater importance because the Nation, by resolution, has cancelled hundreds of similar leases.

Id. at 930. Likewise, the impact of the Oneidas' claim will reach far beyond the boundaries of the present suit. In my initial decision dismissing the claim for lack of jurisdiction, I pointed out that, "it obvious that there are, of necessity, numerous other parties occupying the balance of the 100,000 acre parcel under title derived from New York State, against whom . . . claims could be made." *Oneida Indian Nation v. County of Oneida*, 70-CV-35, slip op. at 9 n. 3 (N.D.N.Y., November 9, 1971).

Nor is the problem limited to this case,[3] this particular land transaction, the Oneida Indian Nation, or even this area.

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[3] The Oneida Nations [*sic*] presently have two other actions pending in this district. *Oneida Indian Nation v. County of Oneida*, 74-CV-187 (N.D.N.Y.) (action for damages challenging some 25 treaties with New York State); *Oneida Indian Nation v. Williams*, 74-CV-167 (N.D.N.Y.) (action for ejectment against 23 landowners).

Other Indian tribes have similar claims[4] in several other states. Litigation brought by the tribes themselves,[5] or by the federal government in their behalf,[6] is already pending. Further suits brought by the United States are imminent. The Department of Justice has alerted the United States Marshal for this district that, unless Congress extends the statute of limitations for such suits beyond July 18, 1977,[7] an action on behalf of the Cayuga and St. Regis Mohawk tribes will be commenced immediately. The Marshal was given this advance notice because it is anticipated that the suit will involve some 10,000 defendants. The potential for disruption in the real estate market is obvious and is already being felt. News reports indicate that title companies have refused to insure titles in areas where Indian land claims exist, even if law suits have not yet been commenced.

The greater part of the disruption and individual hardships caused by litigation such as this could be avoided by seeking solutions through other available vehicles. This in no way is intended to be critical of the plaintiffs' conduct. The trial of this case demonstrated that they have patiently for many years sought a remedy by other means — but to no avail. The aid of the United States as guardian has been sought for the purpose of instituting claims against the State of New York, to challenge not only the 1795 sale but other treaties with the

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[4] These Indian claims have not all been pursued through the orderly mechanism of litigation. *See New York v. White*, 528 F.2d 336 (2d Cir. 1975). *White* arose out of the seizure of land in the Adirondacks by members of the Mohawk and other Indian tribes.

[5] *Mashpee Tribe v. New Seabury Corp.*, 427 F.Supp. 899 (D.Mass. 1977); *Schaghticoke Tribe of Indians v. Kent School Corp.*, 423 F.Supp. 780 (D.Conn. 1976); *Narragansett Tribe of Indians v. Southern Rhode Island Land Development Corp.*, 418 F.Supp. 798 (D.R.I. 1976).

[6] *See Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 388 F.Supp. 649 (D.Me.), *aff'd*, 528 F.2d 370 (1st Cir. 1975) (*Passamaquoddy*).

[7] *See* 28 U.S.C. § 2415.

state.[8] The remedy afforded by Congress against the United States for alleged breach of trust has been and is presently being pursued before the Indian Claims Commission.[9] Finally, it is within the power of Congress to dispose of the matter under the constitutional delegation of power.[10]

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[8] *See* Tr. 198-99; Exhs. 46-48, 51. The parties have advised the court that the United States plans to institute a suit on behalf of the Oneidas to prosecute the tribe's land claims. *Compare, Passamaquoddy, supra* note 6.

[9] The progress of the Oneidas' action in the Indian Claims Commission can be ascertained by reference to the opinions of the Commission. *See* 26 Ind.Cl.Comm. 138 (Aug. 18, 1971); 37 Ind.Cl.Comm. 522 (Mar. 19, 1976), and the intervening opinion of the Court of Claims, *United States v. Oneida Nation of New York*, 477 F.2d 939, 201 Ct.Cl. 546 (1973).

In their answer, defendants raised as an affirmative defense the pendency of proceedings before the Indian Claims Commission. They allege that, "[t]his issue is presently before the . . . Commission." Defendants' answers ¶ 11. The simple rejoinder to this defense is that the same issue is not before this court and the Commission. The case at bar challenges the validity of the 1795 purchase of Oneida land; it seeks money damages from the defendants, present landowners who allegedly lack valid title to the land. The suit in the Indian Claims Commission charges the United States with breach of its fiduciary duty to protect the Oneidas in land dealings with the State of New York. *United States v. Oneida Nation of New York*, 477 F.2d 939, 201 Ct.Cl. 546 (1973). Although these are separate claims, recovery against the United States might well render any other suit academic.

A more important question, whether the Indian Claims Commission was created to provide an exclusive remedy for redress of wrongs to the Indian nations, was not raised by defendants but deserves comment. The Indian Claims Commission was created in 1946 "to right a continuing wrong to our Indian citizens," H.R.Rep.No. 1466, 79th Cong., 2d Sess. (1945); 1946 U.S.C.C.S. 1347, by creating a forum for Indian claims against the United States. The legislative history makes clear that the Commission was to consider only claims against the United States; no intent to supplant Indian claims against other parties, governmental or private, is evidenced. In discussing the nature of the claims to be considered by the Indian Claims Commission, the House Report mentions solely claims against the federal government. *See Id.* Section 1; 1946 U.S.C.C.S. 1350-51.

[10] *See* U.S.Const. art. I, § 8; *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 80 S.Ct. 543, 4 L.Ed.2d 584 (1960); *United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339, 62 S.Ct. 248, 86 L.Ed. 260

The aptness of what was recently said by Chief Judge Kaufman is striking. "As in so many cases in which a political solution is preferable, the parties find themselves in a court of law." *British Airways Board v. Port Authority of New York and New Jersey*, 558 F.2d 75 at 78 (2d Cir. 1977).

I. NATURE OF THE PROCEEDING

The Oneida Indian Nations are suing for damages arising from the allegedly illegal use and occupancy of a part of their aboriginal land. In 1795, the State of New York purchased a large tract of the aboriginal land of the Oneida Nation. Plaintiffs claims that this purchase violated United States treaties and the Indian Nonintercourse Act, 25 U.S.C. § 177. Therefore, plaintiffs contend that the purchase was void and of no effect.

Part of the 1795 purchase is now occupied by the defendant counties. Plaintiffs measure their damages by the fair rental value of such land for the years 1968 and 1969, the period covered by the complaint.

II. BACKGROUND

The action was commenced in 1970. Following a motion for summary judgment by the defendants, this court dismissed the action for lack of federal jurisdiction. It was decided that diversity of citizenship was absent, 28 U.S.C. § 1332, and that federal question jurisdiction was lacking because the case did not "[arise] under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331(a). This court held that the federal question failed to appear on the face of the complaint;

(1941); *cf. Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977).

it only appeared in anticipation of various defenses. The Court of Appeals affirmed, holding that the jurisdictional claim "shatters on the rock of the 'well-pleaded complaint' rule." *Oneida Indian Nation v. County of Oneida*, 464 F.2d 916, 918 (2d Cir. 1972). However, the Supreme Court reversed, stating that plaintiffs'

> assertion of a federal controversy . . . rests on the not insubstantial claim that federal law now protects, and has continuously protected from the time of the formation of the United States, possessory right to tribal lands, wholly apart from the application of state law principles which normally and separately protect a valid right of possession.

Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 677, 94 S.Ct. 772, 782, 39 L.Ed.2d 73 (1974). Because the "Oneidas assert a present right to possession based in part on their aboriginal right of occupancy", *Id.*, the complaint on its face raises a federal question.

After remand, plaintiffs moved for summary judgment, but the motion was denied summarily. I held that summary judgment was inappropriate in such a complex and far-reaching case; a full exploration of all the facts was in order. However, trial of the issues was trifurcated. The parties agreed to try the issue of liability first, reserving the question of damages and that of liability of the State of New York to the defendant counties for later disposition.[11] Subsequently, the plaintiffs developed their proof, largely through documentary exhibits, in a three day trial. The defendants, relying only on the plaintiffs' proof and the law, submitted no evidence.

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[11] Transcript (Tr.) 8-9.

III. FACTS

The Parties

Originally, there were two plaintiffs, the Oneida Indian Nation of New York and the Oneida Indian Nation of Wisconsin. During the trial, plaintiffs moved to amend their complaint to join the Oneida of the Thames Band Council, a band of Oneidas from Ontario, Canada, as party plaintiffs. The motion was granted.

The three plaintiffs are the direct descendants of the Oneida Indian Nation which inhabited Central New York prior to the Revolutionary War. According to expert testimony, this conclusion is supported by extensive research into the kinship and genealogies of the Oneida Nation. (Tr. 63-66, 163-65). Furthermore, the United States is presently paying annuities, which are owed to the Oneida Nation under the Treaty with the Six Nations, executed on November 11, 1794, to the Oneidas in New York and Wisconsin. The Wisconsin Oneidas receive their payments in cash, and the New York Oneidas in cloth. (Tr. 25-26). Also, the Bureau of Indian Affairs recognizes both the Wisconsin and New York Oneidas as the successors in interest to the Oneida Nation of 1794. (Tr. 26, Exh. 49).

This finding is not disturbed by defendants' allegations that the present leadership of the Oneida Nation of New York is in dispute. Regardless of which individuals hold office within the tribe, the tribe is recognized as the direct descendant of the Oneida Nation which inhabited New York 200 years ago. Nothing else is required.

The defendants are the Counties of Oneida and Madison. The parties agree that the defendants now occupy and claim to be the record owners of part of the aboriginal Oneida land, more specifically, part of that area of Oneida land purchased by New York State in 1795.

Historical Background

The Oneidas' aboriginal land ran from the Pennsylvania border north to the St. Lawrence River, from the shores of Lake Ontario to the western foothills of the Adirondack Mountains. (Tr. 69). This region can be described as a band, about fifty miles wide, running north-south through eastern central New York. According to the records of the earliest white missionaries who came to upstate New York, the Oneidas were occupying this land during the early 17th Century. (Tr. 69, 137). They continued to occupy this land until shortly after the birth of the United States.

During the Revolutionary War, the Oneidas fought alongside the Colonists against the British. (Tr. 73). Aside from their service as scouts and their active participation in various battles in upstate New York, the Oneidas performed another valuable function for the Colonies — they prevented the Six Nations or Iroquois from taking a unified stand as allies of the British. (Tr. 73). The Iroquois were the most influential and powerful tribe in the Northeast and had traditionally been an ally of the British.[12] At the outset of the Revolutionary War, the Colonial government sought to secure the neutrality of the Iroquois. Although this result was not achieved, at least the Iroquois did not fight in unison against the Colonists. Because the Oneidas and Tuscaroras allied themselves with the Colonists, the Six Nations put out the council fires and permitted each nation to choose its ally independently.

After the War, the new nation sought to reward and protect its valuable ally, the Oneida Nation. The Treaty of Fort Stanwix, executed in 1784 to make peace with the Six Nations, expressly secured the Oneidas "in the possession of the lands on

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[12] *See F. Cohen, Handbook of Federal Indian Law* 417-418 (University of New Mexico Press reprint of 1942 Ed.) (hereinafter, *Federal Indian Law*).

which they are settled." (Exh. 1).[13] A few years later, in further thanks for their help, the federal government commissioned, post facto, several Oneidas as officers in the United States Army. (Tr. 88, Exh. 11). Twice again, in treaties between the Six Nations and the United States, the federal government secured the Oneidas in the possession of their land.[14]

However, in 1788, because of increasing pressures to open up the Oneidas' land to settlement, the State of New York purchased the great majority of the Oneidas' land from them. They were left with a reservation of about 300,000 acres in the area southwest of Oneida Lake. This reservation is outlined in Exh. 7 and the parties have stipulated that the land involved in this suit lies within the boundaries of this 1788 reservation.

In 1790, Congress passed the first Indian Nonintercourse Act (the Act). That statute prohibited any land transactions with Indian tribes that were not executed by public treaty under the authority of the United States. 1 Stat. 137-38 (Exh. 10). In 1793, the Act was amended into substantially its present form. The gist of the Act remains the same — unless by treaty with the United States or under the authority of the United States, no purchase or grant of land from an Indian tribe "shall be of any validity." 25 U.S.C. § 177.

The 1795 Purchase

By 1795 a conflict had developed between the United States and the State of New York over the State's power to negotiate purchases of land from the Oneidas. The federal policy toward the Oneidas remained the same — the government intended to reward them for past services and to protect them

[13] Treaty of Fort Stanwix (October 22, 1784) 7 Stat. 15.

[14] Treaty at Fort Harmar (January 9, 1789) 7 Stat. 33 (Exh. 3); Treaty with the Six Nations (November 11, 1794) 7 Stat. 44 (Exh. 4).

from predation by the white settlers. (Exhs. 17, 19). New York, however, desired to purchase the Oneidas' land, along with the land of many other Indian nations within its borders. Secretary of War, Timothy Pickering, wrote to United States Attorney General William Bradford for an opinion on whether or not New York had the power to purchase Indian land without the intervention of the United States government. The Attorney General responded by stating the language of the Nonintercourse Act was "too express to admit of any doubt upon the question." (Exh. 22). The Act applied to New York. In his opinion Bradford did not question New York's right to land ceded to the State by treaty entered into prior to the adoption of the Constitution of the United States. However, as to the land reserved to the Oneidas under those treaties, he held that the Oneidas' rights could not be extinguished except "by a treaty holden under the authority of the United States, and in the manner prescribed by the laws of Congress." (Id.)

Pickering had been informed that New York was attempting to purchase land from the Cayuga, Onondaga and Oneida Nations. In June of 1795, he wrote to Israel Chapin, Jr., Superintendent of the Affairs of the Six Nations, ordering him not to aid New York in these purchases. Chapin was further instructed to warn the Six Nations of the illegality of any such transactions with New York. Finally, noting that New York's Governor Clinton refused to request federal commissioners, Pickering hoped that the situation would improve when the new governor, John Jay, took office. (Exh. 24). The hope remained only a hope. In July, Jay wrote Pickering that "on *this* occasion I think I should forbear officially to consider and decide" whether the "Act of 1 March 1793" was constitutional or whether the conduct of New York violated either the United States Constitution or the 1793 Nonintercourse Act. He observed, however, that under the New York Constitution, transactions with Indian tribes must be pursuant to acts of

the Legislature; that the enabling legislation in this instance was silent "[a]s to any intervention or concurrence of the United States," nor did it "by implication direct or authorize the Governor to apply for such intervention." (Exh. 26). Jay noted that arrangements for the meeting with the Six Nations planned for later that summer were finished "before I came into office." (Id.)

Within a week, however, Jay wrote Pickering and requested the appointment of United States Commissioners to negotiate a treaty between New York and the St. Regis Indians. (Exh. 28). In a letter to President Washington, suggesting that a commissioner be appointed for the treaty with the St. Regis, Pickering pointed out New York's inconsistent policy for negotiating with Indians. The State was complying with statutory requirements for the St. Regis, but refused to do so when dealing with the Six Nations. (Exh. 29). The reasons for these differing approaches are nowhere made specific. However, Dr. Jack Campisi, a professor of anthropology and an expert on the Oneida Nations, suggested why New York acted as it had. He stated that New York perceived a difference in federal treatment of different Indian tribes. Since the Oneidas and the United States had been allies, the federal government felt bound to protect their interests. Tribes that had allied with the British received less federal protection. Consequently, New York complied with the Nonintercourse Act when negotiating with previously hostile Indians, but refused to do so when dealing with the friendly Oneidas. The State feared excessive federal protective intervention in the latter case.

In July, New York purchased the Cayuga and Oneida reservations for sums to be paid annually. The tribes were left with small parcels of land. (Exh. 31). When the New York Commissioners then moved on to the Village of Oneida, intending to purchase the Oneidas' land, Chapin travelled to Oneida hoping to dissuade the Indians from dealing with the State.

(*Id.*). At Oneida, he informed the tribe of the federal government's opinion of the illegality of such a transaction. (Exh. 32). He remained there for nine days and no deal was made. After leaving Oneida, Chapin was informed that the state commissioners left two days later, having been unable to reach any agreement with the tribe. (*Id.*). Late in August, Pickering wrote Chapin and informed him that he had acted properly in warning the Oneidas of the illegality of any purchase by New York. However, Pickering then told Chapin that "having done this much, the business might there be left." (Exh. 33). Chapin was instructed to leave matters as they stood.

Despite another letter from Pickering to Governor Jay, outlining the procedure to be followed under the Nonintercourse Act of 1793 (Exh. 34), the State continued to negotiate with the Oneidas. These negotiations culminated in a sale contrary to the provisions of the Act on September 15, 1795 by the Oneidas of approximately 100,000 acres of their reservation. (Exhs. 6, 35). The papers transferring the land were signed at Albany, which was not within the boundaries of the Oneidas' aboriginal land. (Exh. 35). Although the Six Nations had met with the British at Albany, the Oneida Nation had never before executed any treaty or land transaction there. (Tr. 111a-112a). Another irregularity in the transaction appears from the record. Ordinarily, treaties were entered into by tribal consensus (Tr. 188-89), by unanimous decision of the tribe. In this case, powers of attorney were executed enabling certain individuals, none of them chiefs, to negotiate the transaction at Albany. (Tr. 189). Also, although women were not allowed to speak at the tribal council (Tr. 190), half of those Oneidas signing the power of attorney were women. (Tr. 189). Finally, the names of the sachems and chiefs that appear on the September 15, 1795 document were not the signatures of Oneida chiefs. Rather, the signatories of the documents merely used the traditional Oneida names for their sachems and chiefs. (Tr. 192).

In the opinion of Dr. Campisi, no United States Commissioner was present in Albany when the State purchased this land from the Oneidas. (Tr. 126). Superintendent Chapin's expense account shows no expenses incurred in Albany in September of 1795. (Exh. 36). Defendants have presented no evidence demonstrating or even suggesting that a United States Commissioner was present. There is no record that Governor Jay ever requested a commissioner for this transaction. The only finding permitted by the record before me is that no United States Commissioner or other official of the federal government was present at the September 15, 1795 transaction.

Developments after 1795

After 1795, New York State continued to negotiate with the Oneidas for the purchase of their land. Between 1795 and 1846, 25 treaties were executed between the State and the Oneida Nation. Only two of these treaties were conducted under federal supervision as required by the Nonintercourse Act.[15] By 1846, the Oneidas' landholdings in New York had been diminished to a few hundred acres. (Tr. 267).

The social and economic pressures on the Oneidas naturally resulted in the alienation of their land. (Tr. 127-131). In addition, white settlers living in the areas continually encroached on the Oneidas' land. (Tr. 232-233). Land speculators were always urging the Oneidas to sell their reservations. At the same time, New York began agitating for the removal of the Oneidas and other Indians to western lands.[16] The policy of removal was not universally accepted among the Oneidas, and

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[15] *See United States v. Oneida Nation of New York*, 477 F.2d 939, 201 Ct.Cl. 546 (1973).

[16] *Federal Indian Law* 420.

the problem was exacerbated by the efforts of outsiders, clergy and advisors, to urge the Oneidas to move west. (Tr. 131). The Oneida Nation was split into several factions by these pressures. As a result, by the 1840's, three distinct bands of Oneidas existed. One band stayed on the remaining Oneida reservation land in New York; one group of almost 600 had settled on about 65,000 acres in Wisconsin; and another group of about 400 had moved to Ontario, Canada.

Unfortunately, the pressures on the Oneidas to part with their land did not cease once removal had been effected. The Oneidas' meager landholdings in New York were reduced further as a result of a New York statute which divided the tribal landholdings and gave the Oneidas an option to sell their land. (Tr. 227). This option to sell, coupled with the state of extreme poverty in which they lived, more or less forced the sale of much of the remaining Indian land. The loss of land in Wisconsin was much more drastic. In 1887, the Dawes Act, or General Allotment Act, was enacted by Congress. (24 Stat. 388, February 8, 1887). This Act broke up tribal landholdings, distributed individual parcels to individual Indian families, and removed restrictions on the transfer of title.[17] Again, because of the poverty of the Oneidas, they then lost their land through sales, tax sales, or mortgage foreclosures. By the time of the depression, the extent of the Wisconsin Oneidas' landholdings had decreased from 65,000 acres to approximately 600 (Tr. 132, 203, 220).

These forces which acted to deprive the Oneidas of their land had a similar adverse impact on the social conditions of the Oneida Nation. After the Revolutionary War, the Oneida Nation was extremely disorganized because of the displacements which had occurred during the many years of fighting, first against the French and later against the British. (Tr. 128). The

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[17] *Id.* at 206-17.

tribe was suffering from famine and widespread alcoholism. (Tr. 130). The poverty they then experienced became locked in a vicious circle with the loss of their land. These problems were complicated by the Oneidas' illiteracy. Prior to 1800, at the time the great mass of their land was lost, only a few Oneidas had even a minimal ability to understand English orally. (Tr. 129). None could read or write. This state continued through the early 1800's, during the time of removal. (Tr. 218). In fact, up through the 1950's, a translator was needed at meetings of the Oneida Nation of Wisconsin in order to explain actions of the federal government. (Tr. 225). The modest attempts to educate the Oneidas must be viewed in retrospect, as failures. There were schools established by missionaries on the New York reservation by 1796 and on the Wisconsin land by 1907. (Tr. 264). However, these schools had little or no impact on the Oneidas' illiteracy. It was not until 1928 that the first person graduated from the eighth grade from the mission school for the Oneidas in Wisconsin. (*Id.*).

Despite these conditions of poverty and illiteracy, and although their attempts to redress grievances were totally futile, the Oneidas did protest the continuing loss of their tribal land. These efforts were not documented prior to 1909. However, expert witnesses testified that between 1840 and 1875 the Oneidas often attempted to petition the federal government. (Tr. 234). Usually, such petitioning was conducted through the Oneidas' Indian agent. On one occasion, in 1874, a group of Oneidas travelled from Wisconsin to Albany, New York and consulted with a private law firm. All of these efforts were to no avail. (Tr. 234-38). Between 1909 and 1965, the Oneidas contacted the federal government innumerable times in connection with land claims and other grievances. (*See* Exhibits 54, 55).

IV. PLAINTIFFS' CLAIM

The plaintiffs' claim is uncomplicated. The complaint alleged that from time immemorial down to the time of the American Revolution the Oneidas had owned and occupied some six million acres of land in the State of New York. The complaint also alleged that in the 1780's and 1790's various treaties had been entered into between the Oneidas and the United States confirming the Indians' right to possession of their lands until purchased by the United States[18] and that in 1790 the treaties had been implemented by federal statute, the Nonintercourse Act, 1 Stat. 137, forbidding the conveyance of Indian lands without the consent of the United States. It was then alleged that in 1788 the Oneidas had ceded five million acres to the State of New York, 300,000 acres being withheld as a reservation, and that in 1795 a portion of these reserved lands was also ceded to the State. Assertedly, the 1795 cession was without the consent of the United States and hence ineffective to terminate the Indians' right to possession under the federal treaties[19] and the applicable federal statutes. Also alleging that the 1795 cession was for an unconscionable and inadequate price and that portions of the premises were now in possession of and being used by the defendant counties, the complaint prayed for damages representing the fair rental value of the land for the period January 1, 1968, through December 31, 1969. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 663-65, 94 S.Ct. 772, 775, 39 L.Ed.2d 73 (1974) (footnote omitted).

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[18] *See* notes 13 and 14 *supra*.

[19] Plaintiffs claim relief under both the Treaty and the Nonintercourse Act. Since relief is afforded under the statute, it is unnecessary to decide whether the plaintiffs are afforded a claim against these defendants for the alleged treaty violation.

V. NONINTERCOURSE ACT VIOLATION

Since its enactment in 1790 to the present time, the Nonintercourse Act has not materially changed. It is now codified at 25 U.S.C. § 177. It provides:

> No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty.

Mashpee Tribe v. New Seabury Corp., 427 F.Supp. 899 (D.Mass. 1977) (*Mashpee*), is an action similar to this case. The plaintiff tribe seeks a declaratory judgment establishing its right to certain land in Massachusetts allegedly obtained from it in violation of the Nonintercourse Act. In addressing a motion to dismiss the complaint, the court stated that in order to establish a prima facie case,

> . . . plaintiff must show that:
> 1) it is or represents an Indian "tribe" within the meaning of the Act;

> 2) the parcels of land at issue herein are covered by the Act as tribal land;
> 3) the United States has never consented to the alienation of the tribal land;
> 4) the trust relationship between the United States and the tribe, which is established by coverage of the Act, has never been terminated or abandoned.

Id. at 902.

In considering these four factors, attention will focus principally upon the facts relating to the Oneida Indian Nation of New York.[20]

The Oneida Indian Nation of New York has clearly established itself as a tribe within the meaning of the Nonintercourse Act. It is a tribe presently recognized by the Bureau of Indian Affairs.[21] The New York Oneidas still receive annuities under the 1794 Treaty with the Six Nations.[22] Furthermore, they, and the other plaintiffs as well, are the direct descendants of the Oneida Indian Nation which inhabited the area in question before and after the passage of the first Nonintercourse Act. The Act was intended to protect the Oneida Nation. *See Joint Tribunal* [*sic*] *Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975) (*Passamaquoddy*).

The land involved is covered by the Act. The land purchased in 1795 was part of an area reserved for the Oneidas in an earlier treaty with New York State and occupied by them at the time of the enactment of the first Nonintercourse Act. The tract was part of the Oneidas' aboriginal land. The Supreme Court has specified that Indian title in their aboriginal land is

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[20] Since this phase of the trial is solely to determine liability, the rights of the individual plaintiffs to share in a recovery can be left for another day.

[21] Tr. 26.

[22] Tr. 25-26.

entitled to federal protection. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 666-69, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974). Furthermore, this land was secured to the Oneidas in three treaties with the United States, including the 1794 Treaty with the Six Nations.[23] The aboriginal home land of the Oneidas, later confirmed in treaties with the United States Government, is certainly land covered by the Nonintercourse Act, 25 U.S.C. § 177. Therefore, a fiduciary relationship exists between the plaintiffs and the United States. *United States v. Oneida Nation of New York*, 477 F.2d 939, 201 Ct.Cl. 546 (1973).

The proof clearly establishes that the United States never consented to the 1795 purchase. No United States commissioner was present in Albany when New York consummated this cession.[24] In fact, the federal agent for the Six Nations, Israel Chapin, Jr., had earlier traveled to Oneida to dissuade the Indians from dealing with New York. No evidence of any subsequent treaty or act of Congress ratifying the transaction was offered. The federal consent required by the Nonintercourse Act was not obtained before or after the fact.

Defendants argue that federal consent to this purchase was manifested by the subsequent conduct of the United States government. Defendants first raise the broad claim that the federal policy of removal of the Indians[25] validated the 1795 transfer. This broad argument misconceives the nature of Congressional approval required. Termination of Congressional responsibility under the Nonintercourse Act must be explicit. "[A]ny withdrawal of trust obligations by Congress would have to have been 'plain and unambiguous' to be effective." *Passamaquoddy, supra*, 528 F.2d at 380 (footnote omit-

[23] *See* notes 13 and 14 *supra*.

[24] *See* text *supra* at 12-13.

[25] *See Federal Indian Law* 420.

ted). *See also United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339, 346, 62 S.Ct. 248, 86 L.Ed. 260 (1941). Adoption of defendants' argument would emasculate the Nonintercourse Act. The policy of removal, in and of itself, did not effect ratification. Neither did the government's alleged awareness of subsequent transactions between the Oneidas and New York State, *see United States v. Oneida Nation of New York*, 477 F.2d 939, 201 Ct.Cl. 546 (1973), constitute a ratification of the 1795 purchase. Again, defendants can point to no "plain and unambiguous" expression of federal approval.

Defendants see in the 1838 Treaty of Buffalo Creek[26] and its treatment in *New York Indians v. United States*, 170 U.S. 1, 18 S.Ct. 531, 42 L.Ed. 927 (1898), "an explicit recognition and implicit ratification"[27] by Congress of the 1795 purchase, among others. They see a mirage rather than an oasis. The federal government's policy of removal began affecting the Oneidas shortly after 1810. Initially, some Oneidas moved to Wisconsin, where they received a large tract of land ceded by the Menominee and Winnebago tribes.[28] Other Oneidas moved to Canada.[29] The Wisconsin land with some exception was later "cede[d] and relinquish[ed] to the United States" in exchange for a large tract of land in Kansas. Treaty of Buffalo Creek, Article 1, 7 Stat. 551.

An examination of the Buffalo Creek Treaty and the *New York Indians* case fails to support the defendants' interpretation. On its face, the Treaty of Buffalo Creek ceded Indian rights in land in Wisconsin only; no mention was made of Oneida land in New York State. Neither is there any mention of the 1795 agreement with New York. This is a particularly

[26] Treaty of Buffalo Creek (January 15, 1838) 7 Stat. 550.

[27] Defendant County of Madison's Post-Trial Memorandum 32.

[28] *See Federal Indian Law* 420.

[29] Tr. 130-32, 163-65.

significant omission in view of the strenuous efforts made by the United States through President Washington and Secretary of War Pickering to enforce compliance with the Nonintercourse Act. (*See* Exhs. 17, 24). In light of the diametrically opposed views of the Governor of New York and the Central Government as to the applicability of the Nonintercourse Act to the 1795 transaction, (*compare* Exh. 22 *with* Exh. 26), it is hardly likely that the Treaty of Buffalo Creek would have ratified the agreement implicitly instead of expressly. Had there been a desire to legitimatize a transaction theretofore regarded as a contravention of the Nonintercourse Act, the opportunity was presented without question by the Treaty of Buffalo Creek. Article 13, headed "Special Provisions for the Oneidas Residing in the State of New York," 7 Stat. 554, not only presented a logical and convenient place for such a provision, but even suggested it if the parties, in fact, had it in mind. Furthermore, there was resistance among the Oneidas to the removal policy initially,[30] and to the arrangements specified in the Treaty of Buffalo Creek. This resistance to removal was a factor that brought about the dispute resulting in the *New York Indians* case.

> The difficult point in the case, in its equitable aspect, is whether the protests of the Indians and their final refusal to remove in 1846 do not estop them from claiming the benefit of the reservation made for them [in Kansas].

New York Indians, *supra*, 170 U.S. at 28, 18 S.Ct. at 538.[31]

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[30] Tr. 130-32.

[31] Defendants' assertion that the Court of Claims' opinion in *New York Indians v. United States*, 40 Ct.Cl. 448 (1905), established either federal ratification of the 1795 purchase or abandonment of the Oneidas' New York land is equally unsupportable. That opinion merely decided which Indians would participate in the award of damages for the disposition of their reservation in Kansas. The right to such damages had been established by the Supreme Court in *New York Indians v. United States*, 170 U.S. 1, 18 S.Ct. 531, 42 L.Ed. 927 (1898). The Court of Claims held that the Ontario Oneidas were entitled to share in the recovery. At no point did the court find that the New York Oneidas had abandoned their rights to their land in New York. In discussing the unsuccessful nature of the Treaty of Buffalo Creek, the Court noted that:

> None of the tribes moved or was removed to the country set apart; none of them made a demand or request for removal; some of them positively refused to remove when requested by agents and commissioners of the United States; others of them denied that they were parties to the treaty and averred that it had been procured in their names by corruption and fraud.

New York Indians v. United States, 40 Ct.Cl. 448, 451 (1905).

In a similar context, the Supreme Court refused to infer that Congress extinguished the Walapais Indians' rights in their aboriginal land when it established a new reservation for the Walapais and other Indian tribes.

> We find no indication that Congress by creating that reservation intended to extinguish all of the rights which the Walapais had in their ancestral home. That Congress could have effected such an extinguishment is not doubted. But an extinguishment cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards. As stated in *Choate v. Trapp*, 224 U.S. 665, 675, [32 S.Ct. 565, 569, 56 L.Ed. 941], the rule of construction recognized without exception for over a century has been that "doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith."

United States v. Santa Fe Pacific Railroad Co., 314 U.S. 339, 353-54, 62 S.Ct. 248, 255, 86 L.Ed. 260 (1941) (footnote omitted).

The fourth element is proof that the trust relationship between the Oneidas and the United States was never terminated or abandoned.[32] The uncontradicted evidence establishes that this is so. The Oneidas are today a federally recognized Indian nation.[33] Furthermore, they continue to receive annuities under the 1794 Treaty with the Six Nations.[34] Defendants have introduced no evidence whatsoever of any plain and unambiguous withdrawal of Congress' trust obligations. See *Passamaquoddy*, *supra*, 528 F.2d at 380.

A prima facie case of violation of the Nonintercourse Act, 25 U.S.C. § 177, has been established.

Two additional points urged by the defendants should be noted. In reliance on *United States v. Franklin County*, 50 F.Supp. 152 (N.D.N.Y. 1943), defendant County of Oneida construes the Nonintercourse Act as exempting from its coverage states "having a right of preemption", such as New York. In the light of later decisions, this holding of *Franklin County* cannot be considered authoritative. "The rudimentary propositions that Indian title is a matter of federal law and can be extinguished only with federal consent shall apply in all of the states including the original 13." *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 670, 94 S.Ct. 772, 778, 39 L.Ed.2d 73 (1974); *see also United States v. Oneida Nation of*

[32] The essential elements of a prima facie case under the Nonintercourse Act trace their ancestry to *Passamaquoddy*, *supra*. *See Mashpee*, *supra*, 427 F.Supp. at 902. Obviously, this fourth element was essential to plaintiffs' claim in *Passamaquoddy*, for the main issue there was whether a trust relationship existed between the United States and the Passamaquoddy tribe. Although I entertain doubts as to the need for proof of this element in an action brought by the tribe itself, the question is academic in this case since the trust relationship between the United States and the Oneidas has clearly never been terminated or abandoned.

[33] Tr. 26, Exh. 49.

[34] Treaty with the Six Nations (November 11, 1794) 7 Stat. 44. *See* Tr. 25-26.

New York, 477 F.2d 939, 943-44, 201 Ct.Cl. 546 (1973); *Seneca Indian Nation v. New York*, 397 F.Supp. 685 (W.D.N.Y. 1975).

Franklin County's description of the Act as "at most regulatory, designed to prevent fraud", *Franklin County*, *supra*, 50 F.Supp. at 156, and that conclusion that the Act, by its terms, does not require the presence of a United States Commissioner at a treaty as "a prerequisite to its validity", *Id.*, is also urged. The plaintiffs contend that a purchase of land in violation of the act is totally void, whether the Indian nation was defrauded or whether the consideration paid for the land was inadequate.[35] The language of the statute and cases which consider other transfers of restricted Indian land compel the conclusion that the statute renders the 1795 purchase void.

The Nonintercourse Act states that no purchase of Indian land, unless made by treaty or convention pursuant to the Constitution, "shall be of *any validity* in law or equity." 25 U.S.C. § 177 (emphasis added). Any person not employed or authorized by the United States Government who even attempts to negotiate such a purchase can be fined. *Id.* The language of Congress is plain. The statute makes no reference to overreaching or fraud or inadequate consideration. By prohibiting all unauthorized dealings with Indians, it cuts off any inquiry into the fairness of such dealings insofar as the validity of the resulting transfer is concerned.

When Indian land has been transferred contrary to the terms of Congressional enactment, the Supreme Court has not hesitated to void the transaction. In *Bunch v. Cole*, 263 U.S. 250, 44 S.Ct. 101, 68 L.Ed. 290 (1923), a Cherokee Indian

[35] At a pre-trial conference, it was stipulated that inadequacy or lack of consideration is not relevant to either plaintiffs' claims or defendants' affirmative defenses, insofar as issues of liability are concerned. This stipulation does not extend to the damages phase of the trial. (Tr. 7).

leased his land in violation of Congressional restrictions. The Court held the lease void and further held that an Oklahoma statute creating a tenancy-at-will was invalid as applied to the land. In *Ewert v. Bluejacket*, 259 U.S. 129, 42 S.Ct. 442, 66 L.Ed. 858 (1922), a Quapaw Indian sold allotted land in accordance with a statute permitting alienation but prohibiting any person such as the purchaser, an Indian agent, from having "any interest or concern in trade with the Indians." Rev. Stat. § 2078. The Court held the purchase void and remanded for an accounting. 259 U.S. at 138, 42 S.Ct. 442. *See also Smith v. McCullough*, 270 U.S. 456, 46 S.Ct. 338, 70 L.Ed. 682 (1926). A recent case in the Ninth Circuit concluded that the Nonintercourse Act prohibited the Walker River Paiute Tribe from granting an easement to a railroad. *United States v. Southern Pacific Transportation Co.*, 543 F.2d 676 (9th Cir. 1976). In 1882, the railroad's predecessor negotiated with the Tribe and bought a right-of-way across its reservation without Congressional authorization. Ninety-four years later the agreement was held invalid.[36]

> Although it may appear harsh to condemn an apparently good-faith use as a trespass after 90 years of acquiescence by the owners, we conclude that an even older policy of Indian law compels this result.

Id. at 699.

The result in the present case may seem equally harsh. Nevertheless, it is the result mandated by the Nonintercourse Act.

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[36] The Ninth Circuit also considered whether or not the railroad acquired a license for its right-of-way under various Congressional statutes granting rights-of-way to railroads. *See United States v. Southern Pacific Transportation Co.*, 543 F.2d 676 (9th Cir. 1976).

VI. ABANDONMENT

Defendants argue that the plaintiffs abandoned the land involved in this suit, citing *Williams v. City of Chicago*, 242 U.S. 434, 37 S.Ct. 142, 61 L.Ed. 414 (1917). The facts of that case are instructive. In *Williams*, Pattawatomie Indians ceded their land around Lake Michigan to the *United States* and then moved west. Some fifty years later, they attempted to claim land which had originally been under Lake Michigan but had been reclaimed by the time of the suit. The Supreme Court held that the land under Lake Michigan, along with the rest of the aboriginal Pattawatomie land, had been abandoned. However, *Williams* is inapposite to the present case. The Oneida Indians never abandoned their claim to their aboriginal homeland. The small area of land they now occupy lies within the boundaries of the aboriginal land. Furthermore, they never acquiesced in the loss of their land, but have continued to protest its diminishment up until today.

VII. THE PASSAGE OF TIME HAS NOT BARRED THIS SUIT

The violation of the Nonintercourse Act which gave rise to this suit occurred in 1795. Plaintiffs did not commence this action until 1970, 175 years years later. Defendants argue that the passage of time has barred this suit; they raise the defenses of statute of limitations,[37] laches, adverse possession and bona fide purchaser for value. Despite the extraordinary

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[37] Defendants contend that the action is barred by two of New York's statutes of limitations: the six year statute of limitations governing actions "for which no limitation is specifically prescribed by law", *N.Y.C.P.L.R.* § 213(1) (McKinney 1972); and the one year and ninety day statute of limitations governing actions against a county. *N.Y.Gen.Munic.Law* § 50-i (McKinney 1965).

period of time which has passed, the action is not barred. The suit was commenced within the time permitted by 28 U.S.C. § 2415 which governs actions brought by the United States for or on behalf of Indian tribes. This period of limitations applies also to a case such as this one, brought by Indian tribes in their own behalf. Even assuming the necessity of fashioning a federal statute of limitations, Congress has supplied the model to be followed by Section 2415.

It is quite clear that state statutes of limitations and state laws of adverse possession and laches would not bar a suit brought by the United States on behalf of an Indian nation. Where the United States holds title to land in trust for Indians, adverse possession cannot run against the land. *United States v. 7,405.3 Acres of Land*, 97 F.2d 417 (4th Cir. 1938). Restrictions on the alienation of Indian land, which have their origin either in treaties or in land patents, are not weakened by the passage of time. Adverse possession and laches are no defense to a suit by the government to protect restricted land. "It has long been held that adverse possession under a state statute of limitations cannot run against Indians if the land is not alienable by them, so long as such restrictions exist." *United States v. Schwarz*, 460 F.2d 1365, 1371 (7th Cir. 1972); *see United States v. Ahtanum Irrigation District*, 236 F.2d 321 (9th Cir. 1956), *cert. denied*, 352 U.S. 988, 77 S.Ct. 386, 1 L.Ed.2d 367 (1957). In *Ahtanum*, the Ninth Circuit pointed out the impact of the Nonintercourse Act on these defenses.

> And in respect to the rights of Indians in an Indian reservation, there is a special reason why the Indians' property may not be lost through adverse possession, laches or delay. This, as pointed out, in *United States v. 7,405.3 Acres of Land*, 4 Cir. 97 F.2d 417, 422, arises out of the provisions of Title 25 U.S.C.A. § 177, R.S. § 2116, which forbids the acquisition of Indian lands or of any title or claim thereto except by treaty or convention.

United States v. Ahtanum Irrigation District, *supra*, 236 F.2d at 334 (footnote omitted).

Similarly, where individual Indians sue to rescind transfers of restricted Indian land, state defenses cannot render the transfers effective. In a suit to declare invalid a transfer of a restricted land patent, the Supreme Court held that laches was inapplicable. *Ewert v. Bluejacket*, 259 U.S. 129, 42 S.Ct. 442, 66 L.Ed. 858 (1922). Also, in an action for wrongful use and occupancy, a state statute which created a tenancy-at-will was held ineffective where Indian land had been leased in violation of Congressional restrictions. *Bunch v. Cole*, 263 U.S. 250, 44 S.Ct. 101, 68 L.Ed. 290 (1923). If a transfer of Indian land is void under federal law, *see, e.g.*, 25 U.S.C. § 177, it cannot later be made valid by operation of state law.

In the instant case, aboriginal Oneida land was transferred in violation of the Nonintercourse Act, 25 U.S.C. § 177. That statute declares, without any qualification, that no purchase made in violation of the Act "shall be of any validity in law or equity." The language of Congress could not have been plainer. Although this purchase occurred in 1795, it had no validity then nor does it today. New York's statute of limitations and the doctrines of laches, adverse possession, and bona fide purchaser cannot validate this transaction.

This same conclusion has been reached by two other district courts in suits brought to regain Indian land alienated in violation of the Nonintercourse Act. *Schaghticoke Tribe of Indians v. Kent School Corp.*, 423 F.Supp. 780 (D. Conn. 1976); *Narragansett Tribe of Indians v. Southern Rhode Island Land Development Corp.*, 418 F.Supp. 798 (D.R.I. 1976). These cases emphasize the supremacy of federal law, which forbade the transfers, over state statutes which would validate them after the fact. The court in *Narragansett* went further. It noted that the United States, as sovereign, was not subject to these defenses. *See Narragansett*, *supra*, 418 F.Supp. at 805 and

cases cited therein. It reasoned that the Congressional interests in protecting Indian land are the same, whether the United States or the Indians are plaintiffs. Thus, the Indians were permitted to assert the sovereign's interests and the defenses based on the passage of time were held inapplicable. It would be anomalous to permit the government, as trustee for the Indians, to achieve a result more beneficial to the Indians than the Indians could, suing on their own behalf. *See Schaghticoke, supra*, 423 F.Supp. at 785.

This conclusion does not necessarily eliminate the application of any statute of limitations. 28 U.S.C. § 2415[38] provides

[38] The relevant portions of 28 U.S.C. § 2415 provide:

> (a) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later: *Provided*, That in the event of later partial payment or written acknowledgment of debt, the right of action shall be deemed to accrue again at the time of each such payment or acknowledgement: *Provided further*, That an action for money damages brought by the United States for or on behalf of a recognized tribe, band or group of American Indians shall not be barred unless the complaint is filed more than six years and ninety days after the right of action accrued: *Provided further*, That an action for money damages which accrued on the date of enactment of this Act in accordance with subsection (g) brought by the United States for or on behalf of a recognized tribe, band, or group of American Indians, or on behalf of an individual Indian whose land is held in trust or restricted status, shall not be barred unless the complaint is filed more than eleven years after the right of action accrued or more than two years after a final decision has been rendered in applicable administrative proceedings required by contract or by law, whichever is later.
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> (b) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is

a federal statute of limitations for cases brought by the United States for or on behalf of a recognized tribe of American Indians. Actions relating to restricted Indian lands are barred unless brought within 11 years of the date the claim accrued. Any claims which accrued prior to July 18, 1966, the date of the statute's enactment, are deemed to have accrued on the date of enactment. Although Section 2415 does not expressly include suits brought by Indian tribes *in haec verba*, it has been so construed. *Capitan Grande Band of Mission Indians v. Helix Irrigation District*, 514 F.2d 465 (9th Cir.), *cert. denied*, 423 U.S. 874, 96 S.Ct. 143, 46 L.Ed.2d 106 (1975). Actually, whether the limitations of Section 2415 apply to suits brought by Indian tribes as well as the United States is irrelevant in this case. The plaintiffs' complaint was filed in 1970,

> founded upon a tort shall be barred unless the complaint is filed within three years after the right of action first accrues: *Provided*, That an action to recover damages resulting from a trespass on lands of the United States; an action to recover damages resulting from fire to such lands; an action to recover for diversion of money paid under a grant program; and an action for conversion of property of the United States may be brought within six years after the right of action accrues, except that such actions for or on behalf of a recognized tribe, band or group of American Indians, including actions relating to allotted trust or restricted Indian lands, may be brought within six years and ninety days after the right of action accrues, except that such actions for or on behalf of a recognized tribe, band, or group of American Indians, including actions relating to allotted trust or restricted Indian lands, or on behalf of an individual Indian whose land is held in trust or restricted status which accrued on the date of enactment of this Act in accordance with subsection (g) may be brought within eleven years after the right of action accrues.
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> (c) Nothing herein shall be deemed to limit the time for bringing an action to establish the title to, or right of possession of, real or personal property.
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> . . . . . .
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> (g) Any right of action subject to the provisions of this section which accrued prior to the date of enactment of this Act shall, for purposes of this section, be deemed to have accrued on the date of enactment of this Act.

well within the bar provided by the statute. *See Id.* at 472 (Miller, J., concurring).

VIII. THE UNITED STATES IS NOT AN INDISPENSABLE PARTY

Defendants argue that the case must be dismissed for failure to join the United States as an indispensable party. They contend that the fiduciary relationship between the United States and the Indian nation, along with the general federal interest in Indian lands, requires that the United States be made a party to the action or that the action be dismissed. Neither Rule 19 of the Federal Rules of Civil Procedure, nor the adjudicated cases require such a result.[39] The Court of Appeals for the Tenth Circuit, faced with an almost identical situation, refused to dismiss the action. There, plaintiff Indian nations had sued to recover possession of land that was part of the tribes' communal allotment.

> If we hold that the United States is an indispensable party, the Nations will be unable to prosecute a suit to establish their title to, and recover the possession and use of, their lands predicated upon an alleged cause of action which arose more than twenty years ago. On the other hand, if they are permitted to prosecute the suit, in the absence of the United States, a judgment in favor of the defendants will not bind the United States. Defendants assert that that will result in a continuing cloud upon their titles. But, that is their present situation. So long as the United States fails to commence and prosecute to

[39] For an analysis of the factors to be considered in connection with Fed.R.Civ.P. 19, *see Prescription Plan Service Corp. v. Franco*, 552 F.2d 493 (2d Cir. 1977).

> final judgment, an action to establish the title of the Nations to such lands and to recover possession thereof for the Nations, the title of the defendants will continue to be clouded by the possibility of the United States thereafter bringing such an action. So it comes down to this: If we hold that the United States is an indispensable party, the Nations will be unable to assert their longstanding claim to the land; and if we hold that the United States is not an indispensable party, the defendants will run the risk of the burden and expense of defending two lawsuits, even though they succeed in obtaining a judgment in their favor in the instant action.
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> We are of the opinion that the equities presented by the situation and the inconveniences that will result to the Nations, if they are denied the right to prosecute an action, and to the defendant, if the Nations are permitted to prosecute the action without the joinder of the United States, weigh heavily in favor of the Nations.
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> We conclude that final decree determining the title and right to possession as between the Nations and the defendants would not leave the controversy in a situation inconsistent with equity and good conscience.

Choctaw and Chickasaw Nations v. Seitz, 193 F.2d 456, 460-61 (10th Cir. 1951), *cert. denied*, 343 U.S. 919, 72 S.Ct. 676, 96 L.Ed. 1332 (1952).

Two recent decisions in cases almost identical to this one, have held that the United States is not an indispensable party. *Mashpee Tribe v. New Seabury Corp.*, 427 F.Supp. 899 (D.Mass. 1977); *Narragansett Tribe of Indians v. Southern Rhode Island Land Development Corp.*, 418 F.Supp. 798 (D.R.I. 1976). These decisions were based on a long line of cases which have consistently held that, whenever Indian tribes or individual Indians sued to recover either tribal land

or individual allotments, the United States is not an indispensable party. *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 88 S.Ct. 982, 19 L.Ed.2d 1238 (1968); *Fort Mojave Tribe v. Lafollette*, 478 F.2d 1016 (9th Cir. 1973); *Jackson v. Sims*, 201 F.2d 259 (10th Cir. 1953); *Choctaw and Chickasaw Nations v. Seitz*, 193 F.2d 456 (10th Cir. 1951), *cert. denied*, 343 U.S. 919, 72 S.Ct. 676, 96 L.Ed. 1332 (1952). *See generally 3A J.Moore, Federal Practice* ¶ 19.09[8] at 2325 (2d Ed. 1974).[40]

Defendants cite cases that have reached the opposite conclusion for the general proposition that, whenever title to Indian land is involved, the United States is an indispensable party. *See Minnesota v. United States*, 305 U.S. 382, 59 S.Ct. 292, 83 L.Ed. 235 (1939); *Carlson v. Tulalip Tribes of Washington*, 510 F.2d 1337 (9th Cir. 1975); *Nicodemus v. Washington Water Power Co.*, 264 F.2d 614 (9th Cir. 1959). However, these cases all involve attempts to burden land adversely to the interests of the Indians or the United States. These cases have found the United States to be an indispensable party because the United States owns the ultimate fee title to such land, and because a judgment adverse to the Indians could impair the rights of the United States in that fee. These cases differ from the instant suit by Indian tribes to recover aboriginal land, and this important distinction has been noted by the Tenth Circuit.

> In *Choctaw and Chickasaw Nations v. Seitz*, [citation omitted] we recognized the distinction between the indispensability of the Secretary of Interior in a suit, the effect of which would alienate Indian land, and the dispensability of the Secretary in a suit, the effect of which would protect Indian land against alienation, particularly where the Secretary refused, refrained or neglected to protect the Indian's interest.

Jackson v. Sims, 201 F.2d 259, 262 (10th Cir. 1953).

Finally, defendants contend that *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 388 F.Supp. 649 (D.Me.), *aff'd*, 528 F.2d 370 (1st Cir. 1975), compels a dismissal here. Defendants assert that *Passamaquoddy* requires a "*judicially*-initiated effort asking that the United States act on the plaintiffs' behalf" as "a prerequisite to any suit alleging noncompliance with the *Nonintercourse Act*." Defendant County of Madison's Post-Trial Memorandum 9. This suggested reading of *Passamaquoddy* lacks support in the facts. It appears to be a case of the wish being father to the thought.

> Whether, even if there is a trust relationship with the Passamaquoddies, the United States has an affirmative duty to sue Maine on the Tribe's behalf is a separate issue that was not raised or decided below and which consequently we do not address.

Passamaquoddy, supra, 528 F.2d at 375. Nor was the right of the tribe to litigate without the intervention of the United States at issue because of the apparent immunity of Maine to suit. *Passamaquoddy* definitely did not require a suit against the United States as a prerequisite to a tribe's suit under the Nonintercourse Act.

Two actions similar to the instant one, both brought in the First Circuit, have found that *Passamaquoddy* did not hold the United States to be an indispensable party. *Mashpee Tribe*

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[40] Nor need the United States be joined in an action against third persons by certain Indian nations to establish title to and to recover possession of land constituting part of the unallotted common domain of the nations, or in an action by an Indian tribe to quiet title to lands claimed under a treaty with the United States. 3A *J. Moore, Federal Practice*, ¶ 19.09[8] at 2325 (2d Ed. 1974) (footnotes omitted).

v. New Seabury Corp., 427 F.Supp. 899 (D.Mass. 1977); *Narragansett Tribe of Indians v. Southern Rhode Island Land Development Corp.*, 418 F.Supp. 798 (D.R.I. 1976).

IX. THE STATE OF NEW YORK IS NOT AN INDISPENSABLE PARTY

Defendants contend that the action must be dismissed for failure to join the State of New York as an indispensable party. Defendants argue that, as counties, they hold land only as agents of the State. They further argue that an action against the counties will be binding on the State under the law of agent and principal — thus making the State an indispensable party and requiring the dismissal of the suit. The first premise of this argument, however, is faulty and with that faulty foundation removed, the argument collapses.

New York County Law empowers a county's Board of Supervisors to "acquire by purchase or condemnation and accept by gift real . . . property for lawful county purposes." *N. Y. County Law* § 215(3). The county is permitted to lease such property (*Id.*), build upon it (*Id.*), and "sell and convey all the right, title and interest of the county therein." *Id.* § 215(5). Nothing in the statutes limits the extent of the county's title nor specifies that the county holds property as an agent for the State. Neither do any of the cases cited by defendants state that counties in New York hold title to land as agents of the State. *Village of Kenmore v. Erie County*, 252 N.Y. 437, 169 N.E. 637 (1930) (statute requiring counties to collect taxes for villages struck down as violative of state constitutional provision forbidding counties from incurring debts); *Village of Croton-on-Hudson v. County of Westchester*, 38 A.D.2d 979, 331 N.Y.S.2d 883 (2d Dep't.), *aff'd*, 30 N.Y.2d 959, 335 N.Y.S.2d 825, 287 N.E.2d 617 (1972) (county enjoined from diverting parkland to use as a dump without legislative authorization). One case cited by defendants stated, by way of dicta, that a "county is a mere agent of the State." *County of Cayuga v. McHugh*, 4 N.Y.2d 609, 614, 176 N.Y.S.2d 643, 647, 152 N.E.2d 73, 76 (1958). However, the New York Court of Appeals added that counties, as political subdivisions, have "no power save that deputed to them by [the State Legislature]." *Id.* The language of § 215 of the County Law is clear enough — the State has authorized counties to acquire lands, to hold title to these lands, and to use or dispose of them, within certain limits. *N. Y. County Law* § 215. *See also Cooke v. Mulligan*, 81 Misc.2d 1025, 1026-27, 367 N.Y.S.2d 204, 206 (Sup.Ct. 1975).[41]

Ward v. Louisiana Wild Life and Fisheries Commission, 224 F.Supp. 252 (E.D.La. 1963), *aff'd*, 347 F.2d 234 (5th Cir. 1965), cited by defendants, is inapposite. There, the state was the record owner of the land in question. That land had originally been deeded to the Louisiana Board of Commissioners for the Protection of Birds, Game and Fish. A subsequent statute transferred the land to the State of Louisiana.

Since the defendants are the record owners of the land involved in this suit, and since they hold this land in their own right and not as agents for the State, the State need not be joined. Fed.R.Civ.P. 19(a). Complete relief can be accorded

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[41] All of the properties involved here had already been acquired by Albany County as the result of previously held tax sales — most, if not all, of which were conducted long before the plaintiff was elected to office. As such they must be considered county properties and the County owns them proprietorially and can continue to hold them, sell them or lease them pursuant to the provisions of County Law § 215, or otherwise dispose of them at such times and upon such terms as shall be determined by the County Legislature, with or without advertising for bids, subject only to ultimate approval by a majority vote of that body.

Cooke v. Mulligan, 81 Misc.2d 1025, 1026-27, 367 N.Y.S.2d 204, 206 (Sup. Ct. 1975).

among the present parties; the State cannot be prejudiced in any way by its absence; nor does the State's absence subject any of the parties to possible multiple liabilities. Dismissal under Fed.R.Civ.P. 19(b) is not required. *Mashpee Tribe v. New Seabury Corp.*, 427 F.Supp. 899 (D.Mass. 1977).

Defendants concede that the Eleventh Amendment does not insulate them from suit. They argue that the suit must be dismissed against them, however, because the State cannot be made a party defendant by reason of the Eleventh Amendment. Having already determined that it is not necessary to make the State a party defendant, it is equally unnecessary to consider any argument based on the Eleventh Amendment.[42]

X. FORM OF THE ACTION

Casting about among the old common law forms of action for a label with which to tag the claim in this action, the defendants state, "it is difficult to characterize the nature of the plaintiffs' action." Defendant County of Madison's Post-Trial Memorandum 26. They find the most appropriate to be either the old common law "action for use and occupancy" or "an action for wrongful desseisin" or one "of trespass for mesne profits." The defendants then argue with some force that the complaint does not allege all of the essential elements required for any of these actions. *See Crawford v. Town of Hamburg*, 19 A.D.2d 100, 101, 241 N.Y.S.2d 357, 359 (4th Dep't. 1963); *Kelman v. Wilen*, 283 App.Div. 1113, 131 N.Y.S.2d 679, 680 (2d Dep't. 1954); *see generally* 28 C.J.S. *Ejectment* § 132 (1941); 91 C.J.S. *Use and Occupation* § 3 (1955). There is no need to consider the pleading question posed by this argument.

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[42] In any event, equity and good conscience, as in the case of the United States, would militate against dismissal. Fed.R.Civ.P. 19(b). The State is no more an indispensable party than any other person in the chain of title.

As I said in the initial decision considering the jurisdictional question, "[n]o purpose would be served trying to tack a name on the cause of action asserted." *Oneida Indian Nation v. County of Oneida*, 70-CV-35, slip op. at 3 (N.D. N.Y., November 9, 1971).

To start with, the precise form of this action, which would have been so important at common law, is no longer determinative of the action's outcome. Under the Federal Rules of Civil Procedure, the question is not how plaintiffs have characterized the action, but whether plaintiffs are entitled to relief. "[E]very final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings." Fed.R. Civ.P. 54(c). *See generally 6 J. Moore, Federal Practice* ¶ 54.62 (2d Ed. 1976); *10 C. Wright and A. Miller, Federal Practice and Procedure* § 2664 (1973).

> [It] is of no importance at the present time to consider whether the plaintiff's remedy is by replevin, trover, money had and received, or trespass. The real question is whether, under the facts disclosed in the complaint, the plaintiff is entitled to relief. If he is, the court can apply the proper remedy, [under] Rule 54(c) . . ..

Commonwealth Trust Co. of Pittsburgh v. Reconstruction Finance Corp., 28 F.Supp. 586, 588 (W.D.Pa. 1939). *See also Herzog & Straus v. GRT Corp.*, 553 F.2d 789, 791 n.2 (2d Cir. 1977).

Neither can the defendants derive comfort from their contention that the plaintiffs' complaint and proof failed to meet the requirement of state law. "There being no federal statute making the statutory or decisional law of the State of New York applicable to the reservations, the controlling law remained federal law . . .." *Oneida Indian Nation, supra*, 414 U.S. at

674, 94 S.Ct. at 781. Referring to the Indian tribes' right of occupancy, the Supreme Court pointed out that such right "sometimes called Indian title and good against all but the sovereign, could be terminated only by sovereign act. . . . [T]hese tribal rights to Indian lands became the exclusive province of the federal law." *Id.* at 667, 94 S.Ct. at 777. Thus, it is of little import that the plaintiffs failed to establish the elements of a state-based cause of action. *United States v. Forness*, 125 F.2d 928 (2d Cir.), *cert. denied*, 316 U.S. 694, 62 S.Ct. 1293, 86 L.Ed. 1764 (1942) (Seneca Indian Nation suit not barred by failure to comply with state law).[43]

The plaintiffs have established a claim for violation of the Nonintercourse Act. Unless the act is to be rendered nugatory, it must be concluded that the plaintiffs' right of occupancy and possession to the land in question[44] was not alienated. By the deed of 1795, the State acquired no rights against the plaintiffs; consequently, its successors, the defendant counties, are in no better position.

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[43] In *United States v. Forness*, 125 F.2d 928 (2d Cir.), *cert. denied*, 316 U.S. 694, 62 S.Ct. 1293, 86 L.Ed. 1764 (1942), the Seneca Indian Nation sued to cancel a 99 year lease of a portion of its land. Defendant lessees first argued that the suit should be dismissed since they had tendered the rent as New York law requires. The Second Circuit refused to apply New York Law. *Id.* at 932. Defendants also argued that according to the common law, the remedy of cancellation was unavailable because plaintiffs had not made a demand for the rent. The court rejected this argument and declined to be bound by "ancient doctrine." *Id.* at 937.

> It follows that we are here at liberty to apply legal rules as to landlord and tenant which comport with the Congressional intent concerning the Senecas.

Id. at 938. The Court of Appeals ultimately remanded the case to the district court for entry of judgment in favor of plaintiffs, on the condition that plaintiffs' offer for a new lease at a more reasonable rent be kept open. *Id.* at 943.

[44] The parties have stipulated that defendants are record owners of part of the land transferred in 1795. (Tr. 6).

In this phase of the trial, the only question to be determined is that of liability.[45] The extent of the liability and the manner in which the relief is to be fashioned remain for another day. *Cf. Illinois v. City of Milwaukee*, 406 U.S. 91, 92 S.Ct. 1385, 31 L.Ed.2d 712 (1972).

This Memorandum-Decision and Order shall constitute the court's findings of fact and conclusions of law. Fed.R.Civ. P. 52(a).

The court having jurisdiction of the subject matter and the parties hereto, for the reasons herein, it is

ORDERED, that the issue of liability be and it hereby is decided in favor of the plaintiffs and against the defendants; and it is further

ORDERED, ADJUDGED AND DECREED that the defendants be and they hereby are held liable to the plaintiffs by reason of said defendants' occupancy of the land in question during the years 1968 and 1969, all other issues to be determined in a subsequent trial.

The parties have indicated a need for, and the circumstances would seem to compel an appeal from this Order. However, the determination herein does not constitute a final judgment or a judgment which could appropriately be certified for entry as a final judgment pursuant to Rule 54(b), Fed.R.Civ.P. *Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737, 96 S.Ct. 1202, 47 L.Ed.2d 435 (1976); *United States v. Southern Pacific Transportation Co.*, 543 F.2d 676, 681 n.5 (9th Cir. 1976). Therefore, pursuant to 28 U.S.C. § 1292(b), I hereby certify that in my opinion the within Order involves a controlling question of law, i.e. whether a violation of the Nonintercourse Act in 1795 gives rise to a claim against the present record owners of a portion of the involved land. I further certify

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[45] *See* note 11 and accompanying text *supra*.

that an immediate appeal from the Order may materially advance the termination of this and other litigation held in abeyance pending the determination of the issue herein. *See* Rule 5, Fed.R.App.P.

July 12, 1977.

[There follows that portion of the pre-trial memorandum of the counties which relates to the issue of remedies, was treated, alternatively, as a motion to dismiss and is the subject of the order of the court dated March 2, 1981]

Pre-Trial Memorandum of the County of Oneida, New York and the County of Madison, New York on the Issue of Remedies.

I. Introduction.

On July 12, 1977, this Court found that the plaintiff Oneida Indian Nation of New York ("Oneidas") had established that the transfer of land (the "subject land") by the Oneidas to the State of New York pursuant to a 1795 treaty was in violation of the Trade and Intercourse Act. *Oneida Indian Nation of N.Y.* v. *County of Oneida*, 434 F. Supp. 527, 530 (N.D.N.Y., 1977).[1] The Court further determined that the defendants, the counties of Oneida and Madison, New York ("counties") were liable for damages resulting from their use and occupancy of a portion of the subject land from January 1, 1968 through December 31, 1969. *Id.*[2]

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[1] According to the Court, "[b]y the deed of 1795, the State acquired no rights against the plaintiffs; consequently, its successors, the defendant counties, are in no better position." 434 F. Supp. at 548.

[2] Paragraph 22 of the Oneidas' Amended Complaint states that:

> "Subsequent to the 'Treaty' of 1795, part of the premises purportedly deeded to the State and others became occupied by and recorded in the name of the Counties of Oneida and Madison, New York, the defendants herein. The defendants currently occupy parts of said premises for buildings, roads, and other public improvements. By reason of such use and occupancy of plaintiffs' premises defendants for the period January 1, 1968 through December 31, 1969 became indebted to plaintiffs for the fair rental value of such premises to the extent of at least $10,000, exclusive of costs and interest."

The matters determined at the 1977 trial concerned only the issue of liability as between the Oneidas and the counties. According to the Court, "[t]he extent of the liability and the manner in which the relief is to be fashioned remain for another day." 434 F. Supp. at 548. That day has now come and, therefore, this memorandum addresses the legal standards which the Court must apply in devising a remedy, if one exists at all, and if it does, in establishing the measure of damages which accompany a violation of the Trade and Intercourse Act.

II. Nature of the Proceedings.

The Supreme Court has characterized this lawsuit as "essentially a possessory action. . . ." *Oneida Indian Nation of New York State* v. *County of Oneida*, 414 U.S. 661, 666 (1974). Despite this Court's earlier observation that "[n]o purpose would be served trying to tack a name on the cause of action asserted", 434 F. Supp. at 547, quoting *Oneida Indian Nation* v. *County of Oneida*, 70-CV-35, slip op. at 3 (N.D.N.Y., November 9, 1971), Justice Rehnquist noted in his concurring opinion, 414 U.S. at 683, that:

> ". . . the complaint in this action is basically one in ejectment. Plaintiffs are out of possession, the defendants are in possession allegedly wrongfully; and the plaintiffs claim damages because of the allegedly wrongful possession."

The measure of damages appropriate in a typical ejectment action has been the frequent subject of court opinion and is well known. However, the instant action, in Justice Rehnquist's words, is not a "garden-variety" ejectment claim. 414 U.S. at 684. Rather, this Court is required to determine "what the consequences would be if it [the 1795 deed] did not" comply with the 1793 version of the Trade and Intercourse Act. *Oneida Indian Nation of N.Y.* v. *County of Oneida*, 464 F.2d 916, 918 (2d Cir. 1972). This Court has already concluded that the "statute renders the 1795 purchase void." 434 F. Supp. at 541. At issue now is, having come to this conclusion, whether this Court is empowered to award the Oneidas the additional relief sought — monetary damages for the fair rental value of the subject land.

III. The Only Remedy Provided for by the Trade and Intercourse Act is a One Thousand Dollar Criminal Fine.

A. *General Principles for Implying a Private Cause of Action.*

> "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." *Botany Worsted Mills* v. *United States*, 278 U.S. 282, 289 (1928).

The Trade and Intercourse Act of 1793, like its modern-day successor section 177 of 25 U.S.C., was not silent on the question of the appropriate remedy to be imposed in the event the section is violated. Rather, the law both then and now explicitly states that "if any person . . . shall . . . directly or indirectly . . . treat with any such nation or tribe of Indians, for the title or purchase of any lands by them held or claimed, *such person shall forfeit and pay one thousand dollars*. . . ." (emphasis supplied). The Trade and Intercourse Act therefore provides no express cause of action for the remedy the Oneidas seek, i.e., civil damages for wrongful possession of the subject land.

The question whether courts may create or imply a remedy not explicitly set forth in a statute has received considerable atten-

tion as of late from the Supreme Court. Even a causal reading of recent Supreme Court pronouncements in this area suggests that courts should be extremely wary about devising remedies not provided for by the particular statute in question. *See Transamerica Mortgage Investors, Inc.* v. *Lewis*, _____ U.S. _____, 62 L.Ed.2d 146 (1979); *Touche Ross & Co.* v. *Redington*, 442 U.S. 560 (1979); *Kissinger* v. *Reporters Committee for Freedom of the Press*, 48 U.S.L.W. 4223 (1980). Thus, regardless of whether a court might find it desirable to imply a private right of action to effectuate the perceived purposes of a statute, "what must ultimately be determined is whether Congress intended to create the private remedy asserted. . . ." *Transamerica, supra* at 152.

In the instant action, the United States on behalf of the Oneidas is not seeking the statutorily established $1,000 penalty. Rather, the Oneidas themselves ask for the fair rental value of the subject land for the years 1968 and 1969. Monetary damages of this sort are simply not recoverable under the terms of the Trade and Intercourse Acts.

The issue of whether one may imply a private right of action for damages under the Trade and Intercourse Acts has never been squarely addressed by any court. Although this is, therefore, a matter of first impression, statutes remarkably similar in both language and intent have been so scrutinized. In *Transamerica, supra*, the Supreme Court had to determine whether a private right of action for damages could be implied under section 215 of the Investment Advisers Act (15 U.S.C. § 80b-15) on behalf of the intended beneficiaries of that statute. The Court of Appeals had accepted the proposition that although the Act nowhere expressly provided for a private cause of action, one could be properly implied as necessary to achieve the goals of Congress in enacting the legislation. *Transamerica, supra* at 151. The relevant language of the statute in question reads as follows:

> "(b) *Every contract made in violation of any provision of this subchapter* and every contract heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationships or practice in violation of any provision of this subchapter, or any rule, regulation or order thereunder, *shall be void* . . . ." (emphasis supplied).

The Court found that this section, the language of which is, as noted, remarkably similar to 25 U.S.C. § 177, was enacted to benefit the clients of investment advisers and parties to advisory contracts. Indeed, the Investment Advisers Act established "federal fiduciary standards" to govern the conduct of investment advisers. Despite the congressional wish to establish enforceable fiduciary obligations, the Court noted that ". . . whether Congress intended additionally that these provisions would be enforced through private litigation is a different question." *Transamerica, supra* at 153; see also *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U.S. 453 (1974).

The issue of "whether a statute creates a cause of action, either expressly or by implication, is basically a matter of statutory construction." *Transamerica, supra* at 151-152. An analysis of the Investment Advisers Act revealed that it did not explicitly provide for a private right of action. Similarly, the legislative history was silent on this issue. Intent to create such a cause of action may, however, be ascertained from the language or structure of the statute or the circumstances surrounding its enactment. *Id.* at 154. After conducting such an analysis, the Court stated that:

> "If monetary liability to a private plaintiff is to be found, it must be read into the Act. *Yet it is an elemental canon of*

statutory construction that where a statute provides a particular remedy or remedies, a court must be chary of reading others into it." *Id.* at 154-155. (emphasis supplied).

The Court then rejected the *Transamerica* plaintiffs' claims for damages. *Id.* at 157.

In *Leist* v. *Simplot*, Slip Op. 2d Cir., July 8, 1980, Judge Mansfield, in a dissenting opinion, remarked that "if the statute does contain other provisions for its enforcement, such as judicial or administrative remedies, which would secure most if not all of the relief sought in the private action, a private remedy will not ordinarily be implied." The Investment Advisers Act provided for several remedies. A judicial and administrative enforcement mechanism was established. Suits for injunctive relief were authorized and violators were subject to criminal penalties:

> "In view of these express provisions for enforcing the duties imposed by § 206, it is highly improbable that 'Congress absent-mindedly forgot to mention an intended private action.'" "Obviously, then, *when Congress wished to provide a private damage remedy, it knew how to do so and did so expressly.*" *Transamerica, supra* at 155.

The parallels between the *Transamerica* decision and the issue now before this Court with respect to the Trade and Intercourse Acts are striking. Indeed, *Transamerica* appears to be precisely on point and, therefore, dispositive of the issue. The statutory language in each case is practically identical: contracts or conveyances made in violation of the respective statutes are declared void. *Cf.* 15 U.S.C. § 80b-15 *with* 25 U.S.C. § 177. Administrative enforcement mechanisms and criminal penalties for violations of both laws are explicitly established. *Cf.* 15 U.S.C.

§§ 209, 217 *with* 25 U.S.C. §§ 177, 180. Neither statute expressly provides for a private right of action for damages, nor does either "create or alter any civil liabilities" in favor of private plaintiffs. *Transamerica, supra* at 154; see also *Kissinger, supra* at 4226. The legislative history of both acts is silent on the issue and, "[i]mplying a private right of action on the basis of congressional silence is a hazardous enterprise, at best." *Touche Ross, supra* at 571.

> "[W]here, as here, the plain language of the provision weighs against implication of a private remedy, the fact that there is no suggestion whatever in the legislative history that [the statute] may give rise to suits for damages reinforces [the] decision not to find such a right of action implicit within the section." *Id.*

Although both laws were enacted to fulfill federal fiduciary obligations to certain parties,

> ". . . the mere fact that the statute was designed to protect advisers' clients [Indians] does not require the implication of a private cause of action for damages on their behalf [citations omitted]. The dispositive question remains whether Congress intended to create any such remedy." *Transamerica, supra* at 157.

The Supreme Court concluded in *Transamerica* that Congress did *not* intend to create a private cause of action for damages. This Court should follow the Supreme Court's reasoning and reach a similar conclusion here. Indeed, the case for such a conclusion is even stronger here than it was in *Transamerica*, for there is relevant legislative history concerning the Trade and

Intercourse Act, and it demonstrates conclusively that Congress intended no private cause of action for damages.[3]

Despite the clear message enunciated by the Court in *Transamerica*, the Second Circuit has held that under certain circumstances a court may still imply a private cause of action for damages. See *Leist* v. *Simplot, supra*. In *Leist* the Second Circuit ruled that the Commodity Exchange Act implied a private right of action on behalf of injured investors. In reaching this decision, the Second Circuit relied on strong indications in the legislative history that Congress intended to preserve private rights of action and a background of judicial interpretation of the statute recognizing such rights. The decision in *Transamerica* was distinguishable because:

> "Unlike the congressional action in 1974 involved in this case, or that in Cannon in 1972, *the congressional actions in 1934 and 1940 under review in Redington and Transamerica were not taken against a background of widespread judicial recognition of implied private causes of action for damages* either as a general matter or with respect to the specific subject matter of these statutes." (emphasis supplied)

[3] It should be noted that, in the absence of such relevant legislative history, the Supreme Court held that section 215 of the Investment Advisers Act implicitly created a cause of action for rescission and restitution. This is not the relief the Oneidas are seeking here, however. Furthermore, the Supreme Court stated that restitution under section 215 would not be allowed to "provide by indirection the equivalent of a private damage remedy. . . ." *Transamerica, supra* at 158 n.14. Moreover, it is clear from the Supreme Court's opinion that it would not have permitted any private remedy whatsoever under section 215 if there had existed legislative history for section 215 comparable to that discussed *infra* concerning the Trade and Intercourse Act. *Cf. Transamerica, supra* at 153-54 *with id.* at 155-56.

The rationale for distinguishing *Transamerica*, however, renders *Leist* inapplicable to this case. The Trade and Intercourse Acts were most certainly adopted before "the great explosion of judicial implied rights." *Leist, supra*. Moreover, unlike the legislative history in *Leist* which lent support to the majority opinion in that case, the legislative history of the Trade and Intercourse Acts lends no support whatsoever to the Oneidas' position that a private right of action for damages was contemplated by its sponsors.

The unambiguous language and the absence of the legislative history clearly places the burden upon the Oneidas to demonstrate congressional intent to create a private cause of action for damages. In *Cort* v. *Ash*, 422 U.S. 66, 74 (1975), the Supreme Court outlined several factors relevant to determining whether a private remedy is implicit in a statute not expressly providing for one. These factors include:

> (1) Whether the plaintiff is a member of the class for whose "especial benefit" the statute was enacted;
> (2) Whether there is any indication, explicit or implicit, of legislative intent to create or deny such a remedy;
> (3) Whether the implication of a private remedy is consistent with the underlying purposes of the legislative scheme; and
> (4) Whether the cause of action is one traditionally relegated to state law so it would be inappropriate to infer a cause of action based solely on federal law.

Arguably, the Trade and Intercourse Acts were passed for the benefit of Indian tribes or nations. However, as shown in section III(D), *infra*, the Indians were, at most, the incidental beneficiaries of the Act. Rather, the legislation was first and foremost a national security measure. See, *Transamerica, supra* at 157. With respect to the second factor identified in *Cort*, there is no

indication either in the Act or in its legislative history that Congress intended to create a cause of action for money damages. Indeed, that Congress established specific penalties and provided for administrative enforcement, see section III(C), *infra*, is indicative that it was cognizant of the need for the remedies and chose not to select a private cause of action for damages as one of them. The implication of a private remedy, although not per se inconsistent with the underlying purposes of the statute, is by no means common to other national security legislation. Finally, an action to recover mesne profits as a result of the unlawful occupation of one's property is, without doubt, one that is "traditionally relegated to state law". In any event, as the Court in *Touche Ross & Co., supra* at 575, noted concerning the *Cort* criteria:

> "But the Court did not decide that each of these factors is entitled to equal weight. The central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action. Indeed, the first three factors discussed in Cort — the language and focus of the statute, its legislative history and its purpose . . . — are ones traditionally relied upon in determining legislative intent."

As shown in sections III(C) and (D), *infra*, there is no evidence of legislative intent to create such a private cause of action. Indeed, the evidence is quite to the contrary.

B. *Implied Rights of Action Under Indian Law.*

One might argue that despite the obvious similarities between this case and those recently decided by the Supreme Court in cases such as *Transamerica* and *Touche Ross* which take a restrictive view toward implied rights of action, the Court should follow the "general rule that doubtful expressions are to be resolved in favor of the weak and defenseless people [the Indians] who are wards of the nation. . . ." *DeCouteau* v. *County Court*, 420 U.S. 425, 440 (1975). However, this maxim cannot be seized upon as a license to disregard either congressional intent or generally accepted principles of statutory construction. *Id.* at 444, 447. For example, in *Creek Nation* v. *United States*, 318 U.S. 629, 633 (1942), the plaintiffs argued that the Court should construe language contained in an 1866 treaty that "*the United States guarantees them* [the Creeks] *quiet possession of their country* . . ." as requiring indemnification for reservation lands wrongfully taken by a railroad. Despite the Creeks' claim that a guarantee of "quiet possession" would be meaningless without such an indemnification provision, the Court refused to imply such a remedy absent express language in the treaty. "[W]here reparations were planned, clear language was used." 318 U.S. 634.

In *Board of County Commissioners* v. *United States*, 308 U.S. 343 (1939), the United States sought to recover interest on taxes illegally collected by Jackson County, Oklahoma from an Indian tribe. The statute in question permitting the recovery of such taxes was silent on the question of interest:

> "Having left the matter at large for judicial determination within the framework of familiar remedies equitable in their nature [citation omitted], Congress has left us free to take into account appropriate considerations of 'public convenience.'" [citation omitted].

In the opinion of the Court, Jackson County had collected the taxes from the Indians in reliance upon representations of the Federal Government that it was permissible to do so. 308 U.S. at 352-353. Although the United States argued that its Indian

wards should not be penalized for its own lack of diligence, the Court noted that:

> ". . . a choice has to be made between equally innocent victims of official neglect . . . in the administration of the Indian laws.
> "If thereby the Indians are out of pocket, they should not be made whole by putting Jackson [Oneida and Madison] County unfairly out of pocket. The appeal for relief must be made elsewhere."

In *United States* v. *Payne*, 22 Fed. 426 (D. Kansas, 1884), the defendant was charged with illegally settling upon Indian land in violation of R.S. 2118, now 25 U.S.C. § 180 of the Trade and Intercourse Act. The defendant was indicted pursuant to the provisions of section 180 and the United States attempted to collect the $1,000 fine chargeable for such illegal settlements. The court held, however, that section 2124 (the current 25 U.S.C. § 201) which provides that all penalties chargeable under the Act were to be collected in an "action of debt" precluded collection of the fine as part of the criminal process. In the words of the court, "[i]t is an offense created by statute, with a definite penalty attached, and the mode prescribed for enforcing the penalty." 22 Fed. at 427. The mere fact that the subject matter of the Trade and Intercourse Act was Indian affairs was not sufficient to justify a broad and loose interpretation of the statute in fashioning a remedy.

Similarly, in *United States* v. *Hunter*, 21 Fed. 615 (E.D. Missouri, 1884), the United States brought an action to collect the $1,000 penalty set forth in section 177 from the defendant who was charged with illegally negotiating a grazing lease with the Cherokee Indians. In finding that the negotiation of grazing leases did not come within the scope of the section, the court noted that:

> ". . . this being a penal statute, no extended, no strained construction should be put upon the words used in order to include acts not within their plain and ordinary significance." 21 Fed. at 617.[4]

Although the Trade and Intercourse Act was intended to an extent to prevent the improvident disposition of Indian land, its language must be given a "fair and reasonable construction, having in view the plain and ordinary meaning of the terms employed and the evident intent of congress. . . ." 21 Fed. at 616.

Nor would failure to imply a cause of action for damages under the Trade and Intercourse Act render the statute ineffective. Rather, Congress chose alternative means to enforce this law. As Justice M'Lean observed in his concurring opinion in *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 512, 576 (1832), "[a]ll persons are prohibited, under a heavy penalty [$1,000 fine], from purchasing the Indian lands; and all such purchases are declared to be void." In addition to these two remedies, then, under the provisions of 25 U.S.C. § 180, the President may expel the unlawful occupiers. In *Beck* v. *Flournoy Live-Stock & Real Estate Co.*, 65 Fed. 30 (8th Cir., 1884), the real estate company attempted to enjoin an army officer from serving notice upon it that the Department of the Interior had determined that its leases of Indian land were void and it would have to vacate the property. According to the court, the defendant entered into the leases "in the belief . . . that the government would be powerless to recover

[4] In *Cort*, it was argued that if the statute in question provides for a criminal penalty, a court should be precluded from implying a civil cause of action. While the Court refused to adopt this argument as a categorical rule to be applied in all instances, it did hold that there must be some statutory basis for inferring a civil cause of action. *Cort, supra* at 79-80. To imply a private cause of action for damages under section 177 without any statutory basis would, most certainly, be contrary to the principles enunciated in both *Cort* and *Hunter*.

possession of the demised premises . . . except by bringing a multitude of suits in ejectment." 65 Fed. at 37. The court refused to force the government to employ the "barren remedy" of ejectment and permitted the United States to take whatever action necessary to "vindicate its rights". *Id.*

Following the Eighth Circuit's decision upholding the Interior Department's conclusion that the leases in *Beck* were void, the case was remanded to the District Court and in *United States* v. *Mullin,* 71 Fed. 682 (D. Neb., 1895), the court held that "*the executive department* of government is charged with the duty to do whatever may be necessary to protect the Indians in the use and occupancy of their lands, and to oust intruders therefrom; . . ." 71 Fed. at 686-687. (emphasis supplied). The court then went on to hold that the predecessor of 25 U.S.C § 180 clearly places the responsibility for this task in the hands of the executive branch:

> "The judicial branch hears, decides and declares its judgment upon questions brought before it; but when action is needed to enforce the judgment of the court, ordinarily, the appeal is to the executive powers of the government." 71 Fed. at 688.

Case law interpreting other penal provisions of the Trade and Intercourse Act also demonstrates that the courts tend to follow the penalties prescribed by the statute and not fashion their own remedies. For example, in *United States ex rel. Whitehorse* v. *Briggs,* 555 F.2d 283 (10th Cir. 1977), the United States brought an action for trespass of cattle upon Indian land. Section 179 of Title 25 provides a penalty of $1.00 for each animal found trespassing. Rather than applying a common law measure of damages, the court made an award based precisely on section 179 standards.

As these cases demonstrate, courts will not deviate from well established canons of statutory construction and imply remedies not authorized by law simply to benefit Indians. Indeed, the judicially acknowledged penal nature of the Trade and Intercourse Act precludes this Court from ordering statutorily unauthorized relief. Simply put, there is nothing in the relevant case law which would warrant a departure from the basic principles laid down by the Supreme Court in determining whether a cause of action for damages may be implied under the Trade and Intercourse Act merely because the subject of that Act happens to be Indian affairs.

C. *Statutory Analysis of the Trade and Intercourse Acts.*

Having reviewed these general principles, we must begin our analysis "with the language of the statute itself." *Transamerica, supra* at 152. Section 177 of Title 25, United States Code provides in relevant part:

> "That no purchase, grant, lease, or other conveyance of lands, or any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the constitution. And if any person, not employed under the authority of the United States, shall attempt to negotiate such treaty or convention, directly or indirectly, to treat with any such nation or tribe of Indians, for the title or purchase of any lands by them held or claimed, such person shall forfeit and pay one thousand dollars. . . ."

The cognate provisions of the 1793 Trade and Intercourse Act which were in effect at the time the Oneidas conveyed the subject land to the State of New York read:

"That no purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the constitution; and it shall be a misdemeanor, in any person not employed under the authority of the United States, in negotiating such treaty or convention, punishable by fine not exceeding one thousand dollars, and imprisonment not exceeding twelve months, directly or indirectly to treat with any such Indians, nation or tribe of Indians, for the title or purchase of any lands by them held, or claimed: . . ."

As is readily apparent from the statutory language, the 1793 Act provides for two and only two remedies in the event of a violation of its provisions. First, a fine of $1,000 may be imposed *upon the violator* and second, the violator may be imprisoned for up to twelve months. No mention whatsoever is made of any cause of action for damages. Legislative silence in this regard must be considered "purposeful" and strongly suggests that Congress did not intend to create such a cause of action. *See Kissinger, supra* at 4226. Similarly, *Transamerica* clearly compels the conclusion that an action for money damages such as is claimed by the Oneidas is inappropriate. This conclusion is supported not by just the clear and unambiguous language of the non-alienation provision of the 1793 Act but by previous and subsequent versions of this section, the entire statutory scheme of the Trade and Intercourse Acts, and the legislative history and circumstances surrounding enactment of this legislation.

The first Trade and Intercourse Act became law on July 22, 1790. Act of July 22, 1790, Ch. 33, 1 Stat. 137 ("1790 Act"). Although the 1790 Act contained but six substantive sections, it established a broad regulatory scheme to govern contact between

the white and Indian populations. Section 1 of the Act required any person wishing to trade with the Indians to obtain a license for that purpose from the Superintendent of Indian Affairs whose office was housed within the War Department. As a condition of obtaining such a license, the trader was required to post a bond "in the penal sum of one thousand dollars, payable to the President of the United States. . . ." In the event that the trader violated any of the provisions of the Act or rules and regulations promulgated thereunder, the Superintendent was authorized to "put in suit such bonds as he may have taken, immediately on the breach of any condition in said bond. . . ." Section 2, 1790 Act. In addition to regulating the activity of licensed traders, the Act provided that any unlicensed traders found doing business with Indian tribes would forfeit such merchandise as was in their possession, one half the proceeds of which would go to the United States, the other half to the benefit of the person initiating the prosecution of the unlicensed trader. Section 3, 1790 Act.

Although the 1790 Act established substantial penalties for violations of its provisions regulating trade, section 4 which was the predecessor of section 177 established no such penalties for conveyances made without the consent of the United States. Rather, section 4 simply declared that such conveyances would be void. Congress' failure to prescribe any penalty for a violation of this section was consistent with the recommendations of Secretary of War Henry Knox who, in his report of July 15, 1789, urged the Congress to enact a "declarative law" recognizing the right of the Indians to possess their lands subject only to divestment by the United States. *American State Papers: Indian Affairs,* Vol. I. at 53-55 (Washington, D.C.: 1834). Section 4 was therefore simply a declaratory act devoid of any judicially enforce-

able remedies or penalties. This conclusion is supported by the fact that in those provisions of the Act dealing with trade, the Congress chose to establish specific penalties to deal with violation. The legislative silence in section 4 on remedies is thus particularly significant when contrasted with the clear expressions of congressional intent in sections 1-3. "Obviously, . . . when Congress wished to provide a private damage remedy, it knew how to do so and did so expressly." *Touche Ross, supra* at 571, *Transamerica, supra* at 155.

The 1790 Act was limited to just a two-year life span and, on March 1, 1793, Congress enacted a new Trade and Intercourse Act. Act of March 1, 1793, Ch. 19, 1 Stat. 329 ("1793 Act"). The 1793 Act was considerably more detailed than the 1790 version both in terms of its substantive coverage and its enforcement provisions. For example, unlicensed traders, in addition to having their merchandise subject to forfeiture, were now also subject to a fine of up to $100 and imprisonment up to thirty days. Section 3, 1793 Act. In addition, the purchase of horses from Indians by a trader without a special license obtained from the Superintendent of Indian Affairs was forbidden upon pain of forfeiture of his bond and the imposition of up to a $100 fine. Those who purchased a horse with knowledge that it originally belonged to an Indian also were subject to forfeiture of the value of the horse. Section 6, 1793 Act.

For the first time, the 1793 Act specifically addressed the issue of the remedies or penalties available to punish and deter those who encroached upon Indian lands. Whereas the 1790 Act was simply a "declarative law", the 1793 Act made it a misdemeanor punishable by a fine not exceeding $1,000 and up to 12 months in prison to purchase any interest in Indian land without the approval of the United States. Section 8, 1793 Act. Realizing that the threat of criminal sanctions for illegal purchases could be insufficient to deter illegal land acquisitions, the Congress also made it a crime to settle upon Indian land punishable by a fine

of up to $1,000 and 12 months in prison, and gave the President authority:

> ". . . to take such measures, as he may deem necessary, to remove from lands belonging to any Indian tribe, any citizens or inhabitants of the United States, who have made, or shall hereafter make, or attempt to make a settlement thereon." Section 5, 1793 Act (predecessor to 25 U.S.C. § 180).

Section 12 of the 1793 Act dealt specifically with the disposition of the fines and forfeitures collected under the Act. If the prosecution were initiated by an informant, he would receive one half the total collected, the other half going to the United States.[5] If the United States instituted the prosecution, it would be entitled to all the proceeds collected as a result of any fines and forfeitures.

The changes made by Congress in 1793 clearly demonstrate not only an awareness of a variety of remedies to enforce the provisions of the Act but of the need to spell out these remedies directly in the statute. Enforcement responsibilities rested primarily with the administrative apparatus established within the War Department, i.e., the Superintendent of Indian Affairs and, secondarily, upon the use of informants who were enticed to initiate prosecutions by the prospect of receiving half the proceeds collected. Rather than authorizing private damages actions to

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[5] At common law suits for penalties were often prosecuted by informants. According to the court in *United States* v. *Stocking*, 87 Fed. 857, 861 (D. Montana, 1898), the right of an informant to sue for a penalty was questionable unless authorized by statute. The Trade and Intercourse Act specifically adopted this practice as an aid in enforcement.

That Congress should expressly set forth in the statute the right of an informant to bring suit to recover penalties accruing under the act is "another clear indication that Congress knew how to confer a private right of action when it wished to do so." *Transamerica, supra* at 156 n.13.

enforce the Act, Congress chose to rely upon criminal penalties, and the political and military power of the President. In light of the variety of remedies established by the 1793 Act, congressional silence on the question of a private right of action for money damages cannot be viewed as accidental. Significantly, it was the 1793 act that was in effect at the time the Oneidas conveyed the subject land to the State of New York.

On May 19, 1796, Congress once again reenacted a new version of the Trade and Intercourse Act. Act of May 19, 1796, Ch. 30, 1 Stat. 469 ("1796 Act"). While many of the provisions of the 1796 Act were similar in nature to those contained in the 1793 Act, a few items are worthy of comment. For example, the 1796 Act strengthened the provision dealing with illegal settlements on Indian land by explicitly recognizing the right of the President to employ military force to remove such intruders. Section 5, 1796 Act. All "right, title, or claim" to land occupied by such illegal settlers was subject to immediate forfeiture to the United States upon conviction of the offender in a criminal proceeding. Also, for the first time, Congress specifically defined "Indian Country" and forbade any person from crossing over the boundary line so established to hunt or graze animals upon pain of incurring a $100 fine and up to six months in prison. Section 2, 1796 Act. All of these measures, including the non-alienation provision, comprised a comprehensive congressional effort to deter encroachments upon Indian land. Violation of any of these provisions constituted a "crime or offence" and the "fines, and duration of imprisonment" established by the 1796 Act were the "punishment" by which the United States hoped to deter such violations. Sections 17, 18, 1796 Act.

Congress enacted the fourth Trade and Intercourse Act in 1799. (Act of March 3, 1799, Ch. 46, 1 Stat. 743 ("1799 Act")). However, the 1799 Act was, for all practical purposes, identical to the 1796 Act.

In 1802 the Congress once again reenacted the Trade and Intercourse Act. (Act of March 30, 1802, Ch. 13, 2 Stat. 139 ("1802 Act")). While Congress made little in the way of substantive change from the 1799 Act, it again demonstrated a keen awareness of the issue of remedies. In particular, Congress deleted the provision of the 1796 Act requiring forfeiture of all "right, title, or claim" of those found illegally settling upon Indian land. Section 5, 1802 Act. The Congress also, for the first time, specified "[t]hat the amount of fines, and duration of imprisonment, directed by this act as punishment, for the violation of any of the provisions thereof, shall be ascertained and fixed, *not exceeding the limits prescribed,* in the discretion of the court, before whom the trial shall be had; . . ." (emphasis supplied).

Although the Trade and Intercourse Act was amended in both 1816 and 1822, the present day version of the statute became law on June 30, 1834. Act of June 30, 1834, Ch. 161, Stat. 729 ("1834 Act"). Section 10 of the 1834 Act gave the Superintendent of Indian Affairs and his agents authority to remove all persons found illegally in Indian Country and the President was authorized to employ military force to assist in their removal. Section 12, which restricted the rights of the Indians to alienate their property, was also slightly amended by deleting the language making it a misdemeanor to purchase Indian land without the consent of the United States. Although the $1,000 fine was retained, the provision for imprisonment was dropped. As a result of this amendment, section 27 of the 1834 Act was added which provided "[t]hat all penalties which shall accrue under this Act, shall be sued for and recovered in an action of debt, in the name of the United States, . . . the one half to the use of the informer, and the other half to the use of the United States, except when the prosecution shall be first initiated on behalf of the United States, in which case the whole shall be for their use." Again, Congress not only addressed the types of remedies needed to enforce the Trade and Intercourse Act but the manner in which these remedies would be implemented.

The statutory analysis of the predecessor statutes to the present Trade and Intercourse Act leads to only one conclusion: Congress did not intend to create a cause of action for damages as a remedy for violations. First, the Acts are not only silent on this issue but established alternative remedies, i.e. criminal penalties. Second, the Acts establish administrative and political enforcement mechanisms via the Superintendent of Indian Affairs and the War Department. Third, additional penalties are established in other sections of the Acts to prevent illegal settlements, and provision is made for the removal of such illegal settlers upon order of the President. Fourth, the Acts explicitly authorize "informants" to initiate actions to recover the statutory penalties as an aid to enforcement. Fifth, that the United States was entitled to fifty percent of all fines and forfeitures received in suits initiated by informants and the entire amount in actions which itself initiated further demonstrates that a private remedy is not consistent with the underlying statutory scheme.

The multiplicity of remedies contained in the Acts clearly illustrates a congressional awareness of the variety of tools available to achieve compliance. Moreover, the Trade and Intercourse Acts are penal in nature and penal statutes are to be strictly construed. *Ash Sheep Co.* v. *United States*, 252 U.S. 159, 170 (1919). On virtually every count, the Trade and Intercourse Acts are indistinguishable from the statute scrutinized by the Supreme Court in *Transamerica*. For these reasons, the result in this case must follow the dictate of the nation's highest court — no private cause of action for damages can be implied under the Trade and Intercourse Act.

D. *The Political and Legislative History of the Trade and Intercourse Act.*

1. Political History.

It is impossible to understand the true meaning of the Trade and Intercourse Acts without examining the historical context in which they arose. As the Second Circuit noted recently in *Mohegan Tribe* v. *State of Connecticut*, No. 80-7348, Slip Op., December 17, 1980, at 602, "the courts should never ignore strong extrinsic evidence which may serve to explain the meaning of statutory enactments, particularly when the statutes are as deeply embedded in American history as are those relevant here [the Trade and Intercourse Acts]." Such an inquiry by the Court is particularly critical in fashioning a remedy which will be consistent with and authorized by the relevant statutory provision. See *Rosebud Sioux Tribe* v. *Kniep*, 430 U.S. 584, 587 (1977); *DeCouteau* v. *County Court, supra* at 444-445 (1975). As the Supreme Court noted in *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978):

> "These instruments [legislation and treaties relating to Indians] . . . cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them."

As explained above, the Trade and Intercourse Act was first enacted on July 23, 1790.[6] This section formed but a part of a comprehensive piece of legislation designed to regulate trade and intercourse with the Indian nations which, at the time, held sway over a considerable portion of the new nation which, less than

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[6] See Chap. 33, 1 Stat. 137, "An Act to regulate trade and intercourse with the Indian tribes."

a decade before, had won its independence from the British Crown. Also, as explained above, the 1790 Act was subsequently reenacted and amended several times over the next forty-five years.[7] However, the 1834 version of this act has remained essentially intact to the present day.

The rationale underlying this legislation was a simple one—the maintenance of peace between the United States and the Indian tribes residing within its boundaries. According to the foremost authority on the Trade and Intercourse Acts, Prucha, Francis Paul, *American Indian Policy in the Formative Years: The Indian Trade and Intercourse Acts, 1790-1834*. (Cambridge, Mass., Harvard University Press, 1962) ("Prucha"), at 3:

> "The goal of American statesmen was the orderly advance of the frontier. To maintain the desired order and tranquility it was necessary to place restrictions on the contacts between the whites and the Indians. *The intercourse acts were thus restrictive and prohibitory in nature — aimed largely at restraining the actions of the whites and providing justice to the Indians as the means of preventing hostility.*" (emphasis supplied).

The Trade and Intercourse Acts embodied an assertion of federal supremacy in the conduct of Indian affairs for the purpose of securing peace with the native inhabitants of the continent. Such an assertion of centralized authority in this sphere was by no means unique, however. See *Johnson* v. *M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823); *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 512 (1832). Indeed, the British Crown throughout the course of its colonial tenure in North America frequently attempted to as-

[7] The Trade and Intercourse Act was reenacted in 1793, 1796, 1799, 1802 and 1834.

sume similar hegemony over Indian affairs. One instrument of British control was the Proclamation of 1763 which, according to *Prucha, supra* at 21, was:

> ". . . only a means of providing for regulated acquisition of the Indian lands in a way that would not stir up the resentment of the Indians as had the haphazard and often fraudulent methods employed by the individual colonies."

Following Washington's victory over Cornwallis at Yorktown and the conclusion of the Treaty of Paris which granted the colonies their independence from the British Crown, political authority became fragmented under the Articles of Confederation. Although decentralization was a natural reaction to the years of colonial denomination, this policy was ill-suited to the effective management of affairs of state. Dissatisfaction with the Articles of Confederation not only led to the adoption of the Constitution but to a reevaluation of American Indian policy as well. According to *Prucha, supra* at 38, in August 1787 a congressional committee investigating this subject:

> ". . . demanded that Congress give serious attention to the repeated complaints of the Indians about encroachments upon their lands, 'as well because they [the encroachments] may be unjustifiable as on account of their tendency to produce all the evils of a general Indian war on the frontiers'."[8]

[8] Chief Justice John Marshall, speaking on behalf of the Court in *Worcester* v. *Georgia, supra* at 552 (1832) shared the view of his colleagues in the other branches of government that ". . . the strong hand of government was interposed to restrain the disorderly and licentious from intrusions into their [Indian] country, from encroachments on their lands, and from the acts of violence which were often attended by reciprocal murder."

In the early years of the Republic, there were those who doubted that the so-called "experiment in democracy" would survive the pressures from both at home and abroad. The Founding Fathers were acutely aware of the new Republic's precarious existence and, for this reason, their first priority was peace on the frontier. Indeed, it is Secretary of War Henry Knox who, along with President Washington, are viewed as the architects of the first Trade and Intercourse Act. *Prucha, supra* at 44. Knox's purpose in promoting this legislation was to protect the Indians and their lands from unscrupulous whites — not because this was right but because it was necessary to conciliate the Indians in order to preserve the peace. As Secretary Knox noted in a report dated June 15, 1789, *American State Papers*: *Indian Affairs*, Vol. I at 53:

> "As the great source of all Indian wars are disputes about their boundaries, and as the United States are, from the nature of the government, liable to be involved in every war that shall happen on this or any other account, it is highly proper that their authority and consent should be considered as essentially necessary to all measures for the consequences of which they are responsible."

The Trade and Intercourse Acts constituted "[a]n 'efficacious provision' for punishing those who infringed Indian rights . . . and thus endangered the peace of the nation." *Prucha, supra* at 46.

The Knox-Washington view of the Trade and Intercourse Acts as a national security measure was not confined to only the ruling Federalist Party. The leader of the rival Democratic-Republican Party, Secretary of State Thomas Jefferson, shared the Federalist perspective on Indian affairs:

> "I hope too that your admonitions against encroachments on Indian lands will have a beneficial effect — the U.S. find an Indian war too serious a thing, to risk incurring one merely to gratify a few intruders with settlements which are to cost the other inhabitants of the U.S. a thousand times their value in taxes for carrying on the war they produce. I am satisfied it will ever be preferred to send armed force and make war against the intruders as being more just and less expensive."

Prucha, supra at 139, quoting Thomas Jefferson to David Campbell, March 27, 1792.

Although the Trade and Intercourse Acts were intended to promote peace and security on the frontier, they were to do so by regulating, not prohibiting, the transfer of Indian lands. The Act of July 22, 1790, and subsequent versions thereof embodied "[t]he basic policy of the United States . . . that white settlement should advance and the Indians withdraw. Its [the United States'] interest was primarily that this process should be as free of disorder and injustice as possible." *Prucha, supra* at 186. As President Washington remarked regarding the Trade and Intercourse Act in an address to the Congress in 1791:

> " Among the most important of these [objectives] is the defense and security of the western frontiers. To accomplish it on the most humane principles, was a primary wish.
>
> Accordingly . . . effectual measures have been adopted to make these of a hostile description sensible. . .
>
> It is sincerely to be desired, that all need of coercion in [the] future, may cease and that an intimate intercourse may succeed. . .

> In order to do this, it seems necessary-. . . That *the mode of alienating their lands, the main source of discontent and war, should be so defined, and regulated as to obviate imposition* and as far as may be practicable, controversy concerning the reality and extent of the alienations which are made. That commerce with them should be promoted under regulations . . . And, that efficacious provision should be made for inflicting adequate penalties upon all those who, by violating their rights, *shall infringe the treaties, and endanger the peace of the Union*." *American State Papers*: Foreign Relations, Vol. 1, p. 16. (emphasis supplied)*

Thus, the purpose of the Trade and Intercourse Acts was to promote peace and security on the frontier. In fact, "[t]he laws were not 'Indian' laws; they touched the Indian only indirectly as they limited him in his trade and his sale of land. The legislation was, rather, directed against the lawless whites on the frontier and sought to restrain them from violating the sacred treaties made with the Indians." *Prucha, supra*at 48.

This brief excursion into the political history of the Trade and Intercourse Acts is not intended to demonstrate that the prevention of improvident Indian land transfers were not a goal of these laws. *See United States* v. *Southern Pacific Transportation Co.*,

*One scholar has offered the following assessment of President Washington's Indian policy:

> "The suggestions of Washington and Knox had practical results in the early years of the new government. Through a series of trade and intercourse acts direct efforts were made to force American citizens to observe the boundaries established by treaties with the Indians. It was hoped to prevent continued warfare by allowing white-Indian contact only under strict regulation." Horsman, Reginald, *Expansion and American Indian Policy, 1783-1812*. (East Lansing, Michigan: Michigan State University Press, 1967).

543 F.2d 676, 698 (9th Cir. 1976). However, it would be historically inaccurate to maintain that the Acts were passed for the "especial benefit" of the Indians. As the Second Circuit remarked in *Mohegan Tribe, supra* at 603-604, "the evidence rather convincingly demonstrates that the nation's early leaders were perhaps not so charitable toward the Indians as we have come to view them" and "contemporary attitudes have colored our views of the original motives behind American Indian policy. . . ." Rather, "peace along the frontier, and in particular the prevention of encroachment by non-Indian settlers on Indian lands along frontiers, were primary objects of the Act's land provisions." *Mohegan Tribe, supra* at 604.

2. Legislative History.

The legislative history underlying the Trade and Intercourse Act is extremely sparse by today's standards. Some evidence does exist, however, regarding congressional opinion on the question of remedies to enforce the provisions of the Act.

The 1790 Act contained no penalty provision to enforce the substantive provisions of the law. As a result of this inadequacy, President George Washington, in his Third Annual Address delivered on October 25, 1791, urged the Congress "that efficacious provision should be made for inflicting adequate penalties upon all those who, by violating their [Indian] rights, shall infringe the treaties and endanger the peace of the union." "Third Annual Address of President George Washington", Richardson, James (ed.), *Messages and Papers of the Presidents*, Vol. I at 105 (Washington, D.C.: 1896). Similarly, in a speech to Congress on November 6, 1792, President Washington stated that "I cannot dismiss the subject of Indian affairs without again recommending to your consideration the expediency of more adequate provision for giving energy to the laws throughout our interior frontier. . . ." Speech of President George Washington, 2d Cong., 2d

Sess., November 6, 1792. *American State Papers*: *Indian Affairs*, Vol. I, *supra* at 19.

In response to the President's pleas, the 1793 Act, as originally introduced, proposed that a fine of $4,000 and 12 months imprisonment be imposed upon those who violated the Act's non-alienation provision. Acts and Resolutions of the Congress, 2d Cong., 1st Sess., Library of Congress, Washington, D.C. The Act was subsequently amended by the House of Representatives which reduced the $4,000 fine to $1,000. See Section 8, 1793 Act. There is no mention, however, in the original 1793 Act as submitted of any private right of action to enforce the non-alienation provision. Apparently, the Congress viewed a $1,000 fine and 12 months imprisonment as sufficient to enforce the provisions of the Act. Indeed, the reduction of the proposed fine from $4,000 to $1,000 demonstrates that Congress held a restrictive rather than expansionary view towards the issue of enforcement.

Despite the strengthening of the Trade and Intercourse Act in 1793, on January 30, 1794 President Washington complained that "[e]xperience demonstrates that the existing legal provisions are entirely inadequate. . . ." *American State Papers*, *supra* at 472. Thus, the issue of enforcement again surfaced in the congressional debates leading up to the passage of the 1796 Act. In particular, the House of Representatives vigorously debated the wisdom of the clause contained in section 5 of the 1796 Act which provided that any person settling upon Indian land shall "forfeit all his right, title and claim, if any he hath, of whatsoever nature or kind the same shall or may be, to the lands aforesaid. . . ." At issue before the House was whether to retain this forfeiture clause or, alternatively, to strike it and rely exclusively upon a $1,000 penalty and 12 months imprisonment to deter illegal encroachments upon Indian land. Annals of Congress: The Debates and Proceedings in the Congress of the United States, 4th Cong., 1st Sess., Dec. 7, 1795-June 1, 1796 ("Annals"), April 9, 1796 at 893-904.

The proponents of the forfeiture clause argued that previous versions of the Trade and Intercourse Act had proven totally ineffectual in preventing illegal encroachments upon Indian land. In the words of Congressman Crabb, "[i]f the clause was struck out, the bill would be of no use; it would stand as before." *Annals* at 897. The forfeiture clause was viewed as a virtual prerequisite to reducing friction on the frontier between whites and Indians which could lead to a general Indian war. *Annals* at 901. As Congressman Hillhouse noted, *Annals* at 898:

> ". . . it was intended to restrain those daring inhabitants, who declare that, in defiance of Treaties and laws, they will go into the Indian lands, a circumstance which cannot fail to excite the resentment and retaliation of the Indians, which will fall not upon the offenders, for they will be no more found than the wolves, but upon the innocent frontier inhabitants, their wives and children."

The proponents of the forfeiture clause did not wish to rely upon civil process to enforce its provisions. Rather, they argued that "nothing but a superior military force would prevent them [whites] from taking possession of Indian lands." *Annals* at 899, Remarks of Congressman Hillhouse, quoting letter from Governor Blount to Secretary of War, December 19, 1795; see also Remarks of Congressman Gallatin, *supra* at 902-904. As Congressman Gallatin remarked, *supra* at 903:

> "How was it supposed they should drive these people from the land? If Government was so weak as not to prevent them from going upon it, how could they recover the forfeiture and get possession of the land after those people were upon it? Was it supposed that if these persons were not deterred by the present law, which inflicts a penalty of one

> thousand dollars and imprisonment one year that they would be deterred by the present law? No such thing. They would pay 'if Government are not strong enough to prevent us from going upon the land, they will not be able to drive us from it.'"

In Congressman Gallatin's opinion, only a strong military was adequate to the task of removing those illegally occupying Indian lands. However, "as to any legal restraints, the present provisions by law were sufficient, or if the fines were not large enough, they might be made larger."[10] *Annals* at 904.

Opponents of the forfeiture clause argued that forfeiture constituted an irrevocable penalty and that under certain circumstances mitigation might be appropriate. Remarks of Congressman Nichols, *Annals* at 893. This argument proved to be appealing and, on April 9, 1796, the forfeiture clause was struck from the Act. The victory of the opponents of the forfeiture clause was, however, short-lived and, on April 11, 1796, it was reinstated into the Act.

[10]The view that the encroachment of whites upon Indian lands could be halted only through the use of military force was not a novel one. On July 7, 1789, Secretary of War Knox advised President Washington that "[t]he angry passions of the frontier Indians and whites are too easily inflamed by reciprocal injuries, and *are too violent to be controlled by the feeble authority of civil power*." *American State Papers*: *Indian Affairs*, Vol. I at 53. (emphasis supplied) Similarly, on January 4, 1790, Knox again wrote Washington stating that "[n]o peace with the Indians can be preserved, *unless by military force*. *American State Papers*, *supra* at 60. (emphasis supplied). Finally, as late as December 29, 1794, Knox continued to maintain that an "adequate remedy" to prevent the illegal occupation of Indian land would entail not judicial remedies, but a line of military posts on the frontier garrisoned by regular troops. Knox to Washington, December 29, 1794. *American State Papers*, *supra* at 544. As these legislative debates indicate, the members of Congress apparently shared Knox' perspective on this issue.

While the congressional debate focused on the forfeiture clause, it also sheds considerable light on the legislative intent underlying the non-alienation provision. In the first instance, forfeiture applied to persons owning land illegally conveyed in violation of the present section 177. As Congressman Gallatin remarked, the object of the clause was "to make a forfeiture of a real estate for a misdemeanor." *Annals* at 902. Section 5 of the 1796 Act did not explicitly establish settling upon Indian land as a misdemeanor whereas section 12, the non-alienation provision, did. Second, the debate clearly reveals that to the extent the Federal Government wished to rely upon the judicial system to enforce the provisions of the Act, the method chosen was forfeiture, fines and imprisonment, not court-ordered civil damages and ejectments. Rather, Congress chose to rely upon criminal prosecutions to punish, and the political and military powers of the Executive to dispossess those illegally occupying Indian land. Finally, it is clear that in approving the forfeiture clause, Congress did not do so for the "especial benefit" of the Indians. As Governor William Blount of Tennessee wrote to the Secretary of War, "[i]t is . . . not to be denied, that he who preserves peace with Indians thereby serves the Indians; but it is equally true that, by that act, he, in a much *greater degree, serves his fellow-citizens*." Blount to Sec. of War, December 19, 1795, *Annals*, *supra* at 899. (emphasis supplied)

The forfeiture clause contained in section 5 of the 1796 Act was deleted when Congress reenacted the Trade and Intercourse Act in 1802. Section 5, 1802 Act. While there is no direct legislative history available explaining this deletion, certain inferences can be drawn from the debate on this clause which occurred in 1796. In particular, it will be recalled that the opponents had argued that the presence of this clause prevented the Executive from considering circumstances which might mitigate against the imposition of the extreme penalty of forfeiture. The fact that the clause was deleted in 1802 indicates that what since 1796 had

been a mandatory result of a criminal conviction was now viewed by Congress as discretionary. Indeed, section 5 of the 1802 Act permits the President "to take such measures . . . *as he may judge necessary*" to remove persons illegally occupying Indian lands.

This view that Congress preferred to rely on criminal prosecutions and the power of the military rather than the civil authority of the courts to enforce the Trade and Intercourse Act is consistent with subsequent administrative interpretations of the 1802 Act by those officials charged with its enforcement. For example, on January 24, 1812, the Indian agent for the Cherokee nation, Return Jon Meigs wrote Governor William Blount of Tennessee stating that "[j]udicial authority is stated, the duty of the military forces is pointed out in aid of that authority, by which it appears that without the aid of military force there was no power competent for apprehending and punishing offenders against that act [Section 5 of the 1802 Trade and Intercourse Act]." Records of the Superintendencies and Agencies of the Cherokees, National Archives, M 208, r5. Meigs further noted that:

> ". . . at present I presume there is no law making civil process legal within the limits of the Indian boundary and as the regular troops are not in this quarter, there is no power competent to remove or bring out citizens who have taken refuge in the Indian Country for either civil or criminal offenses."

As Indian agents were the principal officials charged with administering and enforcing the provisions of the Trade and Intercourse Acts, their views and interpretations of the law should be accorded deference similar to that which is accorded administrative agencies today by the courts.

Unlike previous versions of the Act, the 1834 version of the Trade and Intercourse Act was accompanied by two legislative reports outlining the congressional rationale behind the legislation. See Report on Regulating the Indian Department, H.R. Rep. 474, 23rd Cong., 1st Sess., May 20, 1834; Senate Doc. No. 72, Report from the Secretary of War, 20th Cong., 2d Sess., February 10, 1829. Unfortunately, neither of these two lengthy reports addresses the issue of remedies in general, or a private right of action in particular with respect to enforcement of the Act's non-alienation provision.

In short, there is no evidence in any of the legislative or political history currently available to support the Oneidas' position that the Trade and Intercourse Act authorizes a private right of action for damages. On the contrary, the legislative history of the Acts, and in particular the congressional debate concerning the mandatory forfeiture provision to the predecessor version of 25 U.S.C. § 180, clearly indicates that Congress did not intend judicially-mandated civil damages or ejectments of persons illegally occupying Indian lands.[11] This legislative history strongly suggests that apart from the $1,000 penalty established, enforcement of the Act rests squarely within the discretionary authority of the Presi-

[11] Although the Oneidas are ostensibly only seeking money damages in this action and not the return of the subject land, they may well argue that the language in *Transamerica, supra* at 154 that "[b]y declaring certain contracts void, § 215 by its terms necessarily contemplates that the issue of voidness under its criteria may be litigated somewhere" implies a private right of action to recover the subject land. Unlike the legislative history of the statute scrutinized in *Transamerica*, however, which was silent on this issue, the legislative history of the Trade and Intercourse Acts and subsequent case law indicate that responsibility for such a determination of voidness and any remedial response attendant thereto resides, at least in the first instance, in the hands of the Executive. See *Beck* v. *Flournoy Live-Stock & Real Estate Co., supra*; *United States* v. *Mullin, supra*. Moreover, under the political question doctrine, the Court is not even empowered to render a simple declaration of rights of the parties to such a dispute over title to allegedly Indian land. See discussion § IV, *infra*.

dent and not upon "the feeble authority of civil power." As the Supreme Court remarked in *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 26 (1977), courts "must be wary against interpolating . . . [their] notions of policy in the interstices of legislative provisions." Thus, the plain language of the Act, a review of predecessor statutes and other legislative history which exists concerning the Trade and Intercourse Act compels the conclusion that no implied remedy for damages was intended — indeed, that no implied remedies of *any* kind were intended. This conclusion is also supported by contemporaneous judicial opinion. For example, in *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 20 (1831), Chief Justice Marshall stated that "after mature deliberation, the majority is of opinion that an Indian tribe or nation within the United States is not a foreign state in the sense of the Constitution and *cannot maintain an action in the courts of the United States*." (emphasis supplied). Chief Justice Marshall's opinion clearly reflects the attitude of the time — an attitude which is totally inconsistent with the notion that Congress intended to imply a private cause of action under the Trade and Intercourse Act. Indeed, it was not until June 2, 1924 that Congress declared that all non-citizen Indians born within the territorial limits of the United States were declared to be citizens. 43 Stat. 253 (1924). Prior to this date, access to the courts by Indians was severely restricted. 1 *Moore's Fed. Prac.* ¶ 0.74 [2.-2], 707.24-707.25 (2d ed. 1980). Thus, given that as late as 1884 the Supreme Court was of the opinion that tribal Indians were not to be accorded citizenship by the Fourteenth Amendment, one cannot readily imput an intent to Congress almost a century earlier to create a private right of action on their behalf. *Elk* v. *Wilkins*, 112 U.S. 94, 99-109 (1884); see also *Yankton Sioux Tribe* v. *United States*, 272 U.S. 351, 356 (1926), in which the Court noted the necessity of jurisdictional legislation in order for Indian tribes to gain access to the federal courts. Such jurisdictional legislation was obviously non-existent at the time Congress considered the Trade and Intercourse Acts (1790-1834).

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

The ONEIDA INDIAN NATION OF NEW YORK STATE, also known as the Oneida Nation of New York, also known as the Oneida Indians of New York and the Oneida Indian Nation of Wisconsin, also known as the Oneida Tribe of Indians of Wisconsin, Inc., and the Oneida of the Thames Band Council, Plaintiffs,	
v.	No. 70-CV-35
The COUNTY OF ONEIDA, New York, and the County of Madison, New York, Defendants.	
Third-Party Plaintiffs,	
v.	
THE STATE OF NEW YORK, Third-Party Defendant.	

ORDER [OF MARCH 2, 1981]

EDMUND PORT, Judge

After due consideration of the plaintiffs' motion to strike Section III of the defendants' "PRE-TRIAL MEMORANDUM . . .

ON THE ISSUE OF REMEDIES" and the defendants' opposition, it is

ORDERED, that Section III of the defendants' memorandum on the issue of remedies entitled, "THE ONLY REMEDY PROVIDED FOR BY THE TRADE AND INTERCOURSE ACT IS A ONE THOUSAND DOLLAR CRIMINAL FINE" is hereby stricken as being outside the scope of issues set for briefing in this Court's pretrial order of June 25, 1980 and, further, as being barred by the law of the case.

Alternatively, treating the said Section III as a motion to dismiss the plaintiffs' complaint for failure to state a claim upon which relief can be granted, it is hereby

ORDERED, that the motion to dismiss be and the same hereby is denied and it is further

ORDERED, that the pretrial order dated June 25, 1980 be modified:

1. By extending the time to file initial memoranda as provided in stipulations of the parties, and
2. By extending the time for the filing of reply memoranda until 14 days from the date of this order.

In all other respects said pretrial order is to remain in effect.[1]

/s/ Edmund Port

Senior U.S. District Judge

Dated: March 2, 1981
Auburn, New York

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[1] The deletion of the limiting phrase "under the political question doctrine" from the second stipulation extending the time for briefing was neither called to my attention nor noticed by me. However, since "the issues raised in the defendants' brief do not go beyond the order even as originally phrased",* the deletion is without significance. To remove any doubt the original phraseology is restored.

* Defendants' Opposition to Plaintiffs' Motion to Strike. p. 7.

United States District Court

Northern District of New York

THE ONEIDA INDIAN NATION OF NEW YORK, et al.,
Plaintiffs,
v.
THE COUNTY OF ONEIDA, NEW YORK, et al.,
Defendants.

Civil Action No. 70-CV-35

Objection.

Now comes the Counties of Madison and Oneida, New York, and object to the Order of the Court (Port, J.) dated March 2, 1981, striking Section III of the defendants' Memorandum on the Issue of Remedies and, alternatively, denying that section as if it were a motion to dismiss.

COUNTY OF ONEIDA, NEW YORK
COUNTY OF MADISON, NEW YORK
By their attorneys,
Allan van Gestel
GOODWIN, PROCTER & HOAR,
28 State Street
Boston, Massachusetts 02109
(617) 523-5700

Dated: March 9, 1981

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

The ONEIDA INDIAN NATION OF NEW YORK STATE, et al., Plaintiffs, v. The COUNTY OF ONEIDA, New York, and the County of Madison, New York, Defendants and Third-Party Plaintiffs v. THE STATE OF NEW YORK, Third-Party Defendant.	No. 70-CV-35

[TRANSCRIPT OF PORTION OF HEARING BEFORE DISTRICT COURT ON MAY 18, 1981, DURING WHICH THE COURT STATES ITS REASONS FOR DENYING THE COUNTIES' MOTION RELATING TO THE APPLICABILITY OF THE POLITICAL QUESTION DOCTRINE]

THE COURT: Miss Locklear, Gentlemen, I think it has probably become apparent from the comments made during the course of the argument what my reaction is to the political question doctrine as applicable to this case. I believe my philosophy has been usually the District Court's job is to decide and

in deciding to briefly tell the parties that did not prevail the reasons in my mind why the decision is as it is. The prevailing party, I think, could care less, usually. If my remarks on the record now, giving you my reasons for deciding as I am, seems somewhat disjointed, it is probably because they are. I have jotted down notes here and there as we have come along and as I have examined your Briefs. The Defendants, it seems to me, have argued principally that this is not a justiciable issue, that it is a political question which the Court lacks power to deal with under the separation of powers. Initially the Defendant took the position that the, and takes the position in its memoranda now, that the Intercourse Act in 1793, which they claim to be applicable to this transaction, by including a provision for a $1,000 forfeiture of penalty and imprisonment of up to 12 months for a violation of the Act provided an exclusive remedy for a violation. They reached that conclusion based on the theory that seems to incorporate more of a pre-emption doctrine as indicated in the recent case of City of Milwaukee against Illinois in the Supreme Court decided April 28th, 1981 than any other. I depart from the Defendant's analysis of that case as it applies to the Oneida case. In that case, the Court, initially in treating the case earlier on a question of original jurisdiction, while finding that the Court lacked jurisdiction nevertheless held that a Common Law claim of nuisance was asserted and that in spite of the presence in various statutes of a number of regulatory provisions regarding the subject matter. Subsequently when City of Milwaukee came up for the second time in which the Court held, in effect, that the area is a matter of Federal concern but had been pre-empted by the Congress, the Congress had by that time enacted a comprehensive plan or program to control the pollution which was the subject matter of the statute Counsel for the Defendants recognized that it was the comprehensiveness of the plan that resulted in the pre-emption by Congress. Congress laid down

in minute detail the conditions that would control leaving nothing for the Court to promulgate, and when the Court went beyond the parameters fixed by Congress, the Supreme Court merely held that Congress had taken the entire area unto itself. Now, to apply that kind of reasoning to a simple statement that merely says, and I am reading from Section 8 of the Trade and Intercourse Act with the Indians 1783, "and be it further enacted no purchase or grant of lands or or have any title or claim thereto from any Indians or nation or tribe of Indians within the bounds of the United States shall be, have any validity in law or equity unless the same be made by a treaty or convention entered into pursuant to the Constitution; that ends the quote. I can't attribute to that simple statement a comprehensive plan for the disposition of claims of invalidity. I think what the Congress has done is establish a policy as they said for the protection of the Indians who were regarded as wards of the United States, regarded like children a policy of protection and it's hard for me to attribute to the Congress a broad statement protecting land transfers of Indians to the extent of making them absolutely void, action of no validity or equity, and yet affording to the beneficiaries of that policy no remedy. Defendants contend that the remedy, that the statute declares a violator to be a miscreant and makes the conviction punishable by a fine not exceeding $1,000 and imprisonment not exceeding 12 months. I think that the crime is broader than what makes a transfer invalid. It's the transfer without the consent in substance without the consent of the United States that becomes invalid, but the misdemeanor consists of even negotiating successfully or unsuccessfully, it's a treaty directly or indirectly for the title of purchase successfully or unsuccessfully and like all crimes, of course, the fine goes to the United States, although in this case it's pointed out if there is an informant one half goes to the informant similar to the Custom Laws. That is an unusual provision from the

early history of the country. To attribute that kind of meanness I think it's mean to say to a people as a ward, as my child that you can't do this if you do it it's void because you're not competent to do it, but if you do it, and some did, and in his discretion feels like prosecuting the person with whom you've dealt, he may do so. As far as you are concerned, buddy, you are out in the cold, somebody else is on your land, you can't bring an action to eject them, you can't get any damages, you've just lost your land. I am not going to attribute to the Congress in what most cases probably have been called speaking with forked tongue. Maybe as the County claimed that is what the Congress intended. If they did, I think it will be more appropriate, more becoming for some Court higher in the hierarchy of the Courts of this one to so declare. As I indicated in the course of the argument, I don't think that the Defendants' intentions are sustained by the history of the Act, sparce though it is. During that period and during the periods of the earlier treaties and subsequent treaties, though glowing statements of protecting the possession in very picturesque language indefinitely, there were statements of the protection that would be afforded the Indian. In the history of the litigation itself, to go back into the legislative history, as I indicated in the Act transferring civil jurisdiction to the State of New York but reserving claims such as this to the Federal jurisdiction, the statement of Congressman Morris I think indicates that it was intended that the Indians have a claim. I think that the fact that statutes of limitations in recent years were enacted to apply to such claims indicate that such claims did exist. You don't apply a statute of limitations to claims of the air, claims that don't exist, and the history of litigation in the Courts indicate that this right to pass on these questions, the question of title, question of right to possession with its allied questions of damages for interruption or interference with that right have existed a long, long time. Johnson-McIntosh which

was referred to in the course of the argument, a case dealing with the transfer of 1775, I believe decided in 1823, dismissed an ejectment action because the Plaintiff derived title which was held to be invalid under it, that would be prior to the Intercourse Act, even, and subsequent cases, United States against Boylin arising in this Circuit in which ejectment was granted and there are a number of cases where the question of title or the invalidity of title by reason of the Trade and Intercourse Act has been determined by the Courts. So that there is a long history of the Courts having exercised this power and I say "exercised" as contrasted with usurped and in this case I think that the Supreme Court itself in reversing the lower Courts on the question of jurisdiction impliedly indicated that such a claim existed. In the absence of a more complete legislative history at the time of the enactment of the first or second Intercourse Act, I can only believe that Congress, instead of attempting or intending to supply an exclusive remedy by means of the fine and imprisonment, intended to impose an additional remedy of a criminal nature for a violation of the statute, a course which is not unusual in a great many areas, I think if anyone wanted to examine the criminal statutes they could find dozens, probably hundreds of crimes which without specification having corresponding civil claims for damages. It comes to mind, I suppose, the horrible instances of people putting razorblades or partial razorblades in candy that's distributed to kids on Halloween, under appropriate circumstances being introduced to inner-state commerce could constitute violations of the Food and Drug Act, mislabeling if they didn't advise of the presence of the razorblades and there is a penalty of the seizure, there is criminal penalties and whatnot. I am sure that wouldn't take the inference, a cause of action away from the damages that he suffers by reason of ingesting one of those pieces of candy and I think you could go on interminably with examples such as that. On the basis of

the complete record in this case, this case has been pending for more years probably than any case in this District. I find no fault with that. I think part of it has been deliberate, part of it has been based on, at least on my part of the nonsupported hope that it would be disposed of. The time I thought would be in favor of that, expressed such a hope in my 1977 Decision but the time has come now — excuse me, I will go back a second — we have had two abortive attempts at getting an Appellate review of these Decisions with reference to liability and one was aborted by the Defendants, by the withdrawal of the appeal in the Second Circuit; the other was aborted after argument by the discovery by the Second Circuit that the Certificate to Appeal under 1292A was improvidently granted. I think the time has come to get a final Decision which will definitely be appealable and which will resolve a number of the questions that have been raised here and which will be applicable to other cases as well as this one. In view of the lengthy time that's been already used in disposing of this litigation, in view of the cases that have actually decided similar cases, in view of the way I see the legislative history and since I feel that the Supreme Court Decision finding jurisdiction impliedly indicated the disposition that I am making here, I'll deny the motion, if it is a motion. It think it was posed more in the form of requesting an Order to Preclude the fashioning of a remedy by reason of the political question doctrine. I will find that the political question doctrine does not preclude the fashion for remedy here and I also feel that in addition to the reasons I have already cited, as I indicated in the course of the argument, that in view of the background, legislative history, the history of decided cases over a long period of time, that if the Defendants should be correct that political question doctrine requires dismissal of this case, that it's more appropriate, becoming that it be done by an Appellate Court. I will prepare a short Order. I request Counsel to adjourn to cham-

bers so that in a more informal atmosphere we can discuss fixing a date for trial or any other housekeeping details that are necessary to bring this to a conclusion. We stand adjourned to chambers.

COURT CLERK: The Court stands adjourned to chambers.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

The ONEIDA INDIAN NATION OF NEW YORK STATE, et al., Plaintiffs, v. The COUNTY OF ONEIDA, New York, and the County of Madison, New York, Defendants and Third-Party Plaintiffs v. THE STATE OF NEW YORK, Third-Party Defendant.	No. 70-CV-35

ORDER [OF MAY 18, 1981]

ORDER

The Court having heard the parties on the applicability of the political question doctrine and having dictated its decision on the record and upon all of the proceedings had herein, it is concluded and ordered that the political question doctrine does not preclude the fashioning of a remedy in this case.

/s/ Edmund Port

Senior U.S. District Judge

Dated: May 18, 1981

[Transcript of a portion of the trial on damages issues held on September 14, 1981, at the United States Courthouse, Auburn, New York, before the Honorable Edmund Port. The transcript includes a portion of the cross-examination of Dr. Jack Campisi, an expert witness called by the plaintiffs, found at Transcript pages [27-31].]

Cross-Examination.

BY MR. VAN GESTEL:

Q Dr. Campisi, my understanding is that you are an anthropologist by profession?

A That is correct.

Q And you have testified here this morning partly as a historian, and partly as a land surveyor, is that correct?

A No.

Q Do you feel comfortable with your testimony that you have given us this morning, that is, do you feel that there are sufficient backup materials in the records that you have examined to enable you to tell this Court where the boundary lines are?

A Yes.

Q And do you feel comfortable, based on your examination of the records in being able to tell the Court the methods used and applied generally by surveyors in setting forth and laying out the lots?

A Generally, yes.

Q When you were testifying a moment or so ago to the effect that subsequent laying out on the map or plan that is Exhibit 59 relied upon things that were laid out in the earlier survey, are you comfortable with that?

A Yes.

Q And do you feel that that was the method that was used by the surveyors?

MS LOCKLEAR: Objection, your Honor. I think that Dr. Campisi's testimony was to the effect that what the state records showed.

THE COURT: I will let him testify.

THE WITNESS: Would you repeat the question?

BY MR. VAN GESTEL:

Q All I am trying to determine, sir, is whether you feel on your extensive examination of the records, whether in fact the surveyor regularly at that time relied on points in previous surveys as their points of demarcation, if you will, for a subsequent survey.

A As far as I could tell from the field books, yes.

Q And in particular, on Exhibit 59, as I understand it, that shows layouts, and the transaction that occurred in 1795, is that right?

A Correct.

Q And layouts of the transactions that occurred in 1798, is that correct?

A Yes.

Q And layouts of the transactions that occurred in 1802?

A Yes.

Q And other subsequent transactions? And it shows lot numbers that were laid out by the Surveyor General, is that not correct?

A I think that is true in all cases except the Peter patent.

Q You know the 1795 survey, which I think is more easily shown on Plaintiffs' Exhibit 58, there is an area that runs sort of north-south, almost a square area, and up in the upper corner is a lot number. Can you tell me what that lot number is?

A I don't have a copy of that.

Q Sorry (offering to witness).

A This one here (indicating)?

Q Yes.

A I can't read it.

Q You are unable to read that copy?

A Well, I can't.

Q Where is the original of that?

A It looks like maybe 54. Is it 54?

Q Does it appear to be lot 54 to you?

A Well —

Q Let me show you something else, then. On Exhibit 57, which is a little more clear, that same lot appears, and what is that last number in the upper northeast corner?

A That is number 54.

Q And down in that same area, Dr. Campisi, in what I suppose is the southeast corner there is a lot number, and what is that?

A 59.

Q And am I correct in understanding that your surveyor relied upon such indicia as lot 54, and lot 59 to do subsequent surveys, or subsequent transactions?

A As far as from what I understand, what they relied on was the boundaries of the external — the external boundaries of the treaty, and whether internally, I don't know what they did.

Q And in the course of your examination of lot — Exhibit 59, for example, have you looked at the several treaties that are represented on that to see if they are accurately described?

A No.

Q You didn't look at the treaty of 1798 to see the point of beginning, if it was lot 54?

A No.

Q And if you look at the 1798 treaty to see if it made reference to lot 59 —

A 1798?

Q Yes.

A No.

Q What is it that enables you to testify here this morning that the various layouts are accurate, on Exhibit 59?

MS. LOCKLEAR: Objection, your Honor. I don't think that Dr. Campisi testified as to accuracy. I think that he testified as to what the state records show.

THE COURT: He may answer. I assume that he considers them accurate because of the places that he found the references to, is that right?

THE WITNESS: That is exactly it.

THE COURT: I don't think that we need that question. I think that it is apparent.

[Transcript of a portion of the trial on damages issues held on September 14, 1981, at the United States Courthouse, Auburn, New York, before the Honorable Edmund Port. The transcript includes a portion of the direct examination of John E. Roberts, a cartographer employed in the Division of Survey, Bureau of Land Management, United States Depatment of Interior, an expert witness called by the plaintiff, found at transcript pages [41-47].]

. . . . . .

Q What is generally considered by cartographers to be the most accurate method of producing a map?

A If there is survey information available, that is the most preferable because it can be the most precisely plotted on the map.

Q Any other methods that are available that can be used?

A In reference to Indian treaties many of them were written before there was detailed information of the country, and they describe a line that goes from a certain river crossing to a certain mountain peak, and along a range of hills, and some such descriptions as that. And it requires considerable judgment in — on the cartographer's part in laying out the lines described in the treaty.

Whereas if there is survey information the lines can be plotted precisely on the map.

Q Mr. Roberts, did your office prepare a map in connection with a case known as Oneida Indian Nation of New York and Oneida Indian Nation of Wisconsin versus United States, Docket 301?

A Yes, they did. I did not personally prepare that map, but my predecessors did.

Q Who was that?

A Several different people were involved in it, but the main one that drew that map up and did the main work on it was Mr. Ernest S-C-H-M-I-D-T.

Q Mr. Roberts, I show you a copy of what was introduced in the liability trial as Exhibit 7. I think I will spread it out here because we won't be using it for a long while.

THE COURT: Would it be helpful to use the side of the jury box to put that map up?

MS. LOCKLEAR: May we enter a stipulation in the record that this document is a copy of Exhibit 7 as introduced in the liability trial?

MR. VAN GESTEL: Your Honor, subject to seeing the original exhibit, it appears to me to be a copy, and I accept Miss Locklear's representation. There appears to be some letters on there that I may not have seen before, but they may not be significant.

THE COURT: All right. I will receive it subject to any proof of any inaccuracy, later.

MR. VAN GESTEL: And I will assume the burden of bringing that to your attention, if any, your Honor.

THE COURT: All right.

BY MS. LOCKLEAR:

Q Do you recognize this document, Mr. Roberts?

A Yes, I do. That is a copy of Docket 301 map prepared by my office.

Q Have you seen a copy of that at your office?

A Yes, I have, We have the original, plus photographs negatives of that.

THE COURT: That is Docket 301 map, and is that how you referred to it?

THE WITNESS: That is the brief reference to it.

THE COURT: Can it be stipulated that the Docket 301 map referred to by the witness is the same as Exhibit 7, and that is the same map — it is a copy of the map introduced as Exhibit 7?

MR. VAN GESTEL: Again, with the caveat of comparisons. It appears to be a copy of the same map, and again, as I look at 59 from here, and I cannot see it all that well at this distance, there appears to be numbers that vary slightly on it, that may or may not be submitted.

THE COURT: All right.

BY MS. LOCKLEAR:

Q Mr. Roberts, could you tell us, would you read from the Docket 301 map itself, what the map purports to represent?

A Well, the title is the Oneida Nation versus United States, and Docket Number 301, Claims 3 through 8. Oneida Reservation, New York, 26 Indian Claims Commission, 138, 1971.

Q Does that document separately demarcate those lands that were the subject of the 1795 cession between the Oneidas and New York State?

MR. VAN GESTEL: Objection.

THE WITNESS: Yes.

MS. LOCKLEAR: I will rephrase the question, your Honor.

THE COURT: All right, rephrase it.

BY MS. LOCKLEAR:

Q Does the caption on the document state that it separately demarcates the boundaries of those lands that were the subject of the 1795 transaction between the Oneida and the State of New York?

A Yes, in the legend it states the treaty dates and the boundaries that are depicted on the map, and among those are the tracts of the September 15th, 1795 treaty.

Q And how are those tracts marked on this document?

A They are tracts 1 and 2, the numbers 1 and 2 depicted on the map.

Q Okay. Mr. Roberts, I show you what has been introduced as Plaintiffs' Exhibit Number 56 (offering to witness). Can you identify that document?

A This is the survey or General's Field Book, Book 27, Oneida Reservation, Pages 3 to 13.

Q What is that document, Mr. Roberts?

A It is a copy of the field notes kept by the surveyor in the 1797 survey of a portion of the 1795 treaty.

Q Have you seen that document before?

A Yes, I have.

Q And where did you see it?

A It was provided to me by your office, and I examined it in my office.

Q Mr. Roberts, I show you a copy of Plaintiffs' Exhibit marked 57. Have you seen that document before?

A Yes, I have.

Q What is it?

A The title of it is "A Map of the Lake Oneida Reservations Surveyed in 1796, Surveyor General Maps Number 227."

The title on that map says, "A Map of the Lake Oneida Reservation Surveyed in 1796 by H.P. Schuyler."

It is approved by the Surveyor General.

Q Have you seen that document before?

A Yes, I have.

Q And where did you see it?

A I also saw this in my office as provided by yourself.

Q Mr. Roberts, I show you Plaintiffs' Exhibit marked Number 58, and can you identify that (offering to witness)?

A This is a certified copy of Surveyor General Map Number 898, a map of the Oneida Reservation.

Q Have you seen that document before?

A Yes, I have.

Q And where did you see it?

A Similarly in my office, as provided by your office.

Q And finally, Mr. Roberts, have you seen this document which is marked for introduction in evidence as Exhibit Number 59, Plaintiffs' Number 59?

A Yes, I have.

Q And what is that?

A That is a certified copy of Surveyor General Map Number 206, untitled.

Q Where have you seen it before?

A Similarly, in my office as provided by yours.

Q Mr. Roberts, did you undertake any steps to make a comparison of the exhibits we just referred to, Numbers 56 through 59, with the Docket 301 map?

A Yes, I did.

Q What did that comparison consist of? Will you describe the steps?

A Generally, I just observed the various maps, visually, to perceive how well they agreed with the depiction on the Docket 301 map, and it was immediately apparent that —

MR. VAN GESTEL: I object.

THE COURT: Well, he is telling us what he saw. All right, go ahead.

THE WITNESS: It appears or appeared to me that —

BY MS. LOCKLEAR:

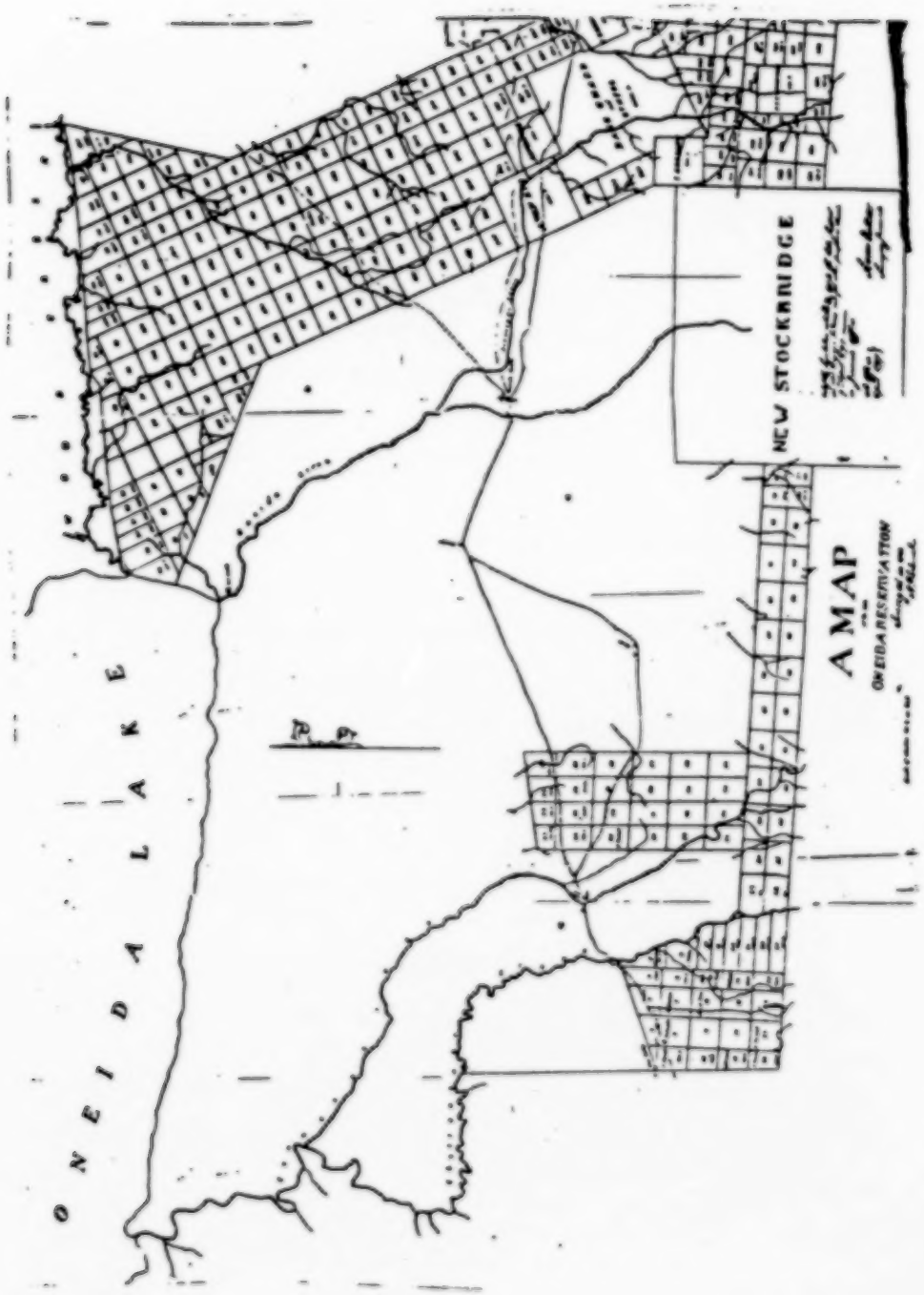
Q What did you conclude from your visual observation or comparison of these documents?

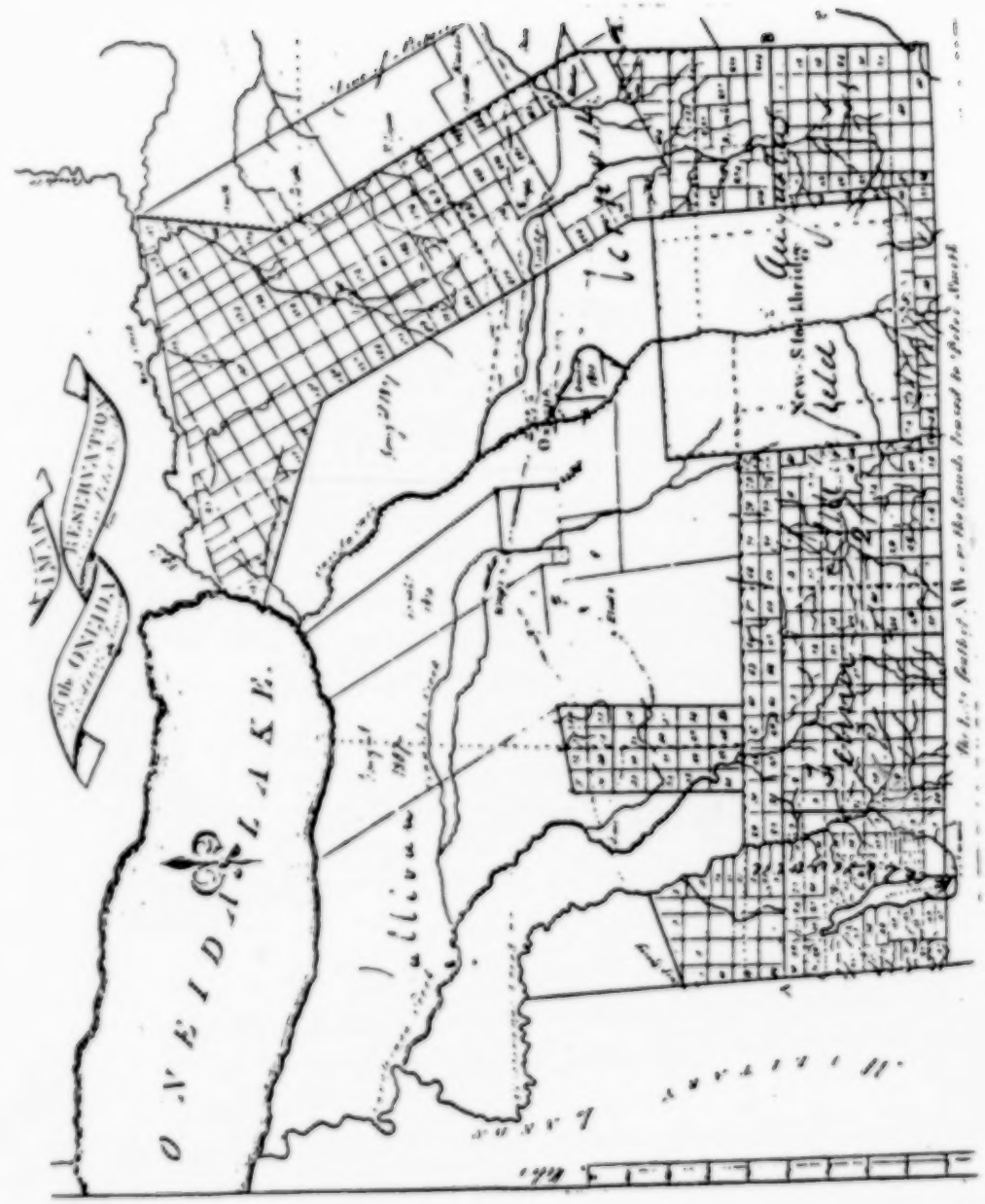
A That they all portrayed the same general areas, and contained largely the same lines, and that the untitled map was the most similar to the Docket 301 map.

Q Were there any particular characteristics that you based those conclusions on?

A Largely the shoreline of Oneida Lake and the streams depicted throughout the map appeared to be quite similar to the ones on the Docket 301 map. I then proceeded to compare a reduced copy of the Docket 301 map, with the certified copy of the untitled compilation of survey map on a cargo reflecting projector.

. . . . . .





UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

The ONEIDA INDIAN NATION OF NEW YORK STATE, et al., Plaintiffs, v. The COUNTY OF ONEIDA, New York, and the County of Madison, New York, Defendants and Third-Party Plaintiffs v. THE STATE OF NEW YORK, Third-Party Defendant.	No. 70-CV-35

NOTICE OF MOTION TO DISMISS OF DEFENDANTS COUNTY OF MADISON AND COUNTY OF ONEIDA [OF SEPTEMBER 25, 1981]

TO: Arlinda F. Locklear
Native American Rights Fund
1712 N Street, N.W.
Washington, D.C. 20240

Attorney General
State of New York
Albany, New York
12224

Bertram Hirsch
76-17 250 Street
Bellerose, New York 11426

SIRS and MADAM:

PLEASE TAKE NOTICE that upon the memoranda filed herewith, and all other papers and proceedings had herein, the defendants County of Madison and County of Oneida will move this Court, at the United States Courthouse, Auburn, New York, on Monday, October 5, 1981, at 10:00 a.m., or as soon thereafter as counsel can be heard, for the entry of judgment dismissing this case for the following reasons:

I. The 1795 New York State Treaty was validated by the Treaty of June 1, 1798, and the Treaty of June 4, 1802 (which two Treaties had the requisite federal participation and approval) insofar as:

A. the latter Treaties constituted plain and unambiguous ratification of the 1795 cession under *United States* v. *Santa Fe Pacific Railroad Co.*, 314 U.S. 339 (1941);
B. the 1798 and 1802 Treaties ratified the 1795 Treaty under the standard established in *Seneca Nation* v. *United States*, 173 Ct. Cl. 912 (1965);
C. the federal approval of the 1795 cession embodied in the 1798 and 1802 Treaties and in the Congressional

action on the latter two Treaties constitutes incorporation by reference of the 1795 Treaty into federal law; and

D. the approval of the 1795 Treaty embodied in the 1798 and 1802 Treaties and in the Congressional action on the latter two Treaties constitutes termination of the reservation status of all land within the 1795 cession boundaries under *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584 (1977).

II. The federal common law presumption of a "lost grant" to the land in issue negates any liability on the part of the defendant counties.

III. The 1788 New York Treaty, as confirmed by the 1794 Treaty of Canandaigua, provides prospective federal approval for the 1795 New York Treaty and therefore there is no liability on the part of the defendant counties.

IV. The 1794 Treaty of Canandaigua, in Article VII, provides the sole remedy for the Oneida Nation in the face of the actions of the counties of Madison and Oneida with regard to the land in question, which remedy is a political remedy specifically granted thereby to the President of the United States.

V. This action presents solely nonjusticiable political questions mandating dismissal of the action in its entirety.

VI. The plaintiffs have not proved themselves to be anything other than successors in interest to the Oneida Nation. In the absence of a specific federally approved transfer of the interests of the Oneida Nation in the land in issue to the plaintiffs, they are not entitled to any relief.

COUNTY OF MADISON and
COUNTY OF ONEIDA
By their attorneys,
/s/ Allan van Gestel

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

The ONEIDA INDIAN NATION OF NEW YORK STATE, et al., Plaintiffs, v. The COUNTY OF ONEIDA, New York, and the County of Madison, New York, Defendants and Third-Party Plaintiffs v. THE STATE OF NEW YORK, Third-Party Defendant.	*	No. 70-CV-35

PARTIAL FINDINGS OF FACT AND CONCLUSIONS OF LAW [OF OCTOBER 5, 1981]

1. Parcels 1 and 2 of Exhibit 7* in the liability trial accurately depict the location of the metes and bounds description in Exhibit 6, the 1795 treaty. The land claimed by the defendant counties within said parcels is subject to this action.
2. Exhibit 60 is an accurate transposition of Parcels 1 and 2 on said Exhibit 7 onto a U.S.G.S. base map.

* A copy of Exhibit 7 is attached to defendants' Reply Memorandum on the Issue of Remedies.

Madison County Lands

3. During 1968 and 1969 Madison County claims title to and was in possession of the Champlain Battleground Park, which contains 47.22 acres and is located within the exterior boundaries of Parcels 1 and 2 of said Exhibit 7.
4. The highest and best use of Champlain Battleground Park was a park consistent with its present use.
5. Madison County did not lease out or otherwise receive any monetary profit from its use and occupancy of Champlain Battleground Park during 1968-69.
6. The fair market value of the park during 1968-1969 was $10,600.
7. Madison County claims title to, and during 1968 and 1969 was in possession of a 2.07 acre parcel, which is one of the highest points in the surrounding area. It was used by Madison County as a fire department radio tower, and is located within the exterior boundaries of Parcels 1 and 2 of said Exhibit 7.
8. The highest and best use of the Madison County radio tower was as a site for radio-transmission-receiving purposes in a manner similar to its present use.
9. The fair market value of the Madison County radio tower tract as of 1968-1969 was $1,750.
10. Madison County did not lease out or otherwise receive any monetary profit from its use and occupancy of the radio tower tract during 1968-69.
11. Madison County claims title to, and during 1968 and 1969 was in possession of approximately 63.17 miles of property used as highways located within the exterior boundaries of Parcels 1 and 2 of Exhibit 7.

12. The highest and best use of the subject land used by Madison County as highways depends on the highest and best use of the adjoining land from which it was carved. As of 1968-1969 these uses were agricultural, residential and commercial.
13. Madison County did not lease out or otherwise receive any monetary profit from its use and occupancy of the 63.17 miles of subject highways during 1968-69.

Oneida County Lands

14. Oneida County claims title to, and during 1968 and 1969 was in possession of a 13.128 acre gravel bed that is located within the exterior boundaries of Parcels 1 and 2 of said Exhibit 7.
15. The Oneida County gravel bed is unimproved but has some remaining potential for excavation of gravel and other fill material.
16. The highest and best use of the Oneida County gravel bed was for excavation of gravel, sand and fill material.
17. The fair market value of the Oneida County gravel bed as of 1968-1969 was $7200.
18. Oneida County did not lease out or otherwise receive any ascertainable monetary profits for its use and occupancy of the gravel bed during 1968-69.
19. Oneida County claims title to, and during 1968 and 1969 was in possession of approximately 61.5 miles of land that is improved as highways and that are located within the exterior boundaries of Parcels 1 and 2 of Exhibit 7.

20. The highest and best use of the subject land used by Oneida County as highways depends on the highest and best use of the adjoining land from which they were carved. As of 1968-1969 these uses were agricultural and residential.
21. Oneida County did not lease out or otherwise receive any monetary profit from its use and occupancy of subject highways during 1968-69.

Madison and Oneida Counties

22. The counties of Madison and Oneida, New York, were not in existence in 1795 at the time of the transaction complained of in this action.
23. No evidence has been presented to show that the Counties of Madison and Oneida, New York, acted other than in good faith when they came into possession of the County Land in the claim area subsequent to 1795 and prior to January 1, 1968.
24. None of the improvements which existed on the land claimed by the Counties of Madison and Oneida, New York, in the claim area in 1968 or 1969 existed on that land in 1795.
25. The members of the Oneida Indian Nation of New York, the Oneida Indian Nation of Wisconsin and the Oneida of the Thames Band Council were not prevented from using the land which is the subject of this claim during the calendar years 1968 and 1969 in the same manner as the public generally.
26. In connection with the purported sale of land pursuant to the Treaty of 1795, the Oneida Nation received certain compensation from the State of New York.

27. There is no evidence that any of the plaintiffs or their predecessors ever refused or returned any of the payments received for the purported sale of land pursuant to the Treaty of 1795.

PARTIAL CONCLUSIONS OF LAW

1. As this Court determined in its memorandum-decision and order, to the extent the defendant-counties claim title to and possess any part of the lands purportedly ceded by the September 15, 1795 transaction between the Oneidas and New York State, they do so in violation of the Nonintercourse Act. Because the Oneidas' right of occupancy and possession to the land in question was not alienated by the 1795 transaction and has not since been lost, the defendant-counties have illegally claimed title to, used and occupied Oneida land. *Oneida Indian Nation of New York* v. *County of Oneida*, 434 F. Supp. 527, 548 (N.D.N.Y.). Therefore, plaintiffs are entitled to a remedy for the counties' illegal use and occupancy of Oneida land.

2. The fashioning of a remedy for violation of the Non-Intercourse Act is a justiciable federal question and, as in formulating a remedy for violation of any federal prohibitory statute, is to be undertaken with reference to the literal language of the statute and the federal policy reflected in the statute. *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448 (1957); *Sola Electric Company* v. *Jefferson Electric Company*, 317 U.S. 178 (1942).

See Heckman v. *United States*, 224 U.S. 413, 438-439 (1912).

> Whether these restrictions upon the alienation of the alloted lands had been violated and the alleged conveyances were void, was a justiciable question; and in

> order that it might properly discharge its duty, and that it might obtain adequate relief, suited to the nature of the case in accordance with the principles of equity, the United States was entitled to invoke the equity jurisdiction of its courts.

3. The Nonintercourse Act reflects a dual federal policy: first, the statute is intended to protect Indian tribes from overreaching by third parties in the disposition of tribal land by establishing the United States' trust obligation to oversee all such transactions, *Federal Power Commission* v. *Tuscorora Indian Nation*, 362 U.S. 99, 119 (1962); *Joint Tribal Council of Passamaquoddy Tribe* v. *Morton*, 528 F.2d 370, 379 (1st Cir. 1975); second, the statute preserves the United States' sole prerogative to extinguish Indian Title. *United States* v. *Santa Fe Pacific Railroad*, 314 U.S. 339, 346-48 (1941).

4. The fact that the defendants are political subdivisions of the State of New York is an appropriate consideration in the partial incorporation of state law in the controlling federal law. *Board of County Commissioners* v. *United States*, 308 U.S. 343 (1939).

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

The ONEIDA INDIAN NATION OF NEW YORK STATE, et al.,
Plaintiffs,
v.
The COUNTY OF ONEIDA, New York, and the County of Madison, New York,
Defendants and
Third-Party
Plaintiffs,
v.
THE STATE OF NEW YORK,
Third-Party
Defendant.

NO. 70-CV-35

[TRANSCRIPT OF DECISION OF COURT DICTATED FROM BENCH ON OCTOBER 5, 1981]

DECISION in the above-captioned matter by HONORABLE EDMUND PORT, in the United States Courthouse, Auburn, New York, on October 5th, 1981.

APPEARANCES:
FOR THE PLAINTIFFS: ARLINDA LOCKLEAR, ESQ.
BERTRAM HIRSCH, ESQ.
FRANCIS SKENANDORE, ESQ.
LAWRENCE ASCHENBRENNER, ESQ.
FOR THE DEFENDANTS: ALLAN Van GESTEL, ESQ.
TOBIN M. HARVEY, ESQ.

THE COURT: Miss Locklear, gentlemen, as I indicated at the close of the evidence, I intended, if it was possible, to hear your arguments and to render my Decision on the record following that. I see no reason why that should not be followed.

I have had an opportunity, of course, since the trial to examine the exhibits, to review my notes, where I felt it was necessary, and to review the memoranda that were submitted. I want to thank Counsel for the thoroughness with which this case was prepared and presented to the Court. It was very helpful to me. In fact, speaking of thoroughness, the thoroughness reached the point of reminding me of the tactic which, without meaning to be disrespectful to any Court, I can't say that I wasn't guilty of using when I was practicing law, and, that is, throw anything at the old fool. You don't know what he will pick up if he wants to hold your way.

Some of the arguments, at least to my simple mind, were pretty far out; but I understand the importance of the case and I understand the necessity of making a record that includes every possible or potential argument that can be advocated in favor of either of the parties.

What I am about to place on the record will constitute the findings of fact and conclusions of law, and, of course, what's put on the record now is supplemented by my previous Decisions, all along the line, and by some prepared, written findings of fact and conclusions which I will file with the Court. Those findings and conclusions were largely, if not wholly, derived from the suggested findings of fact and conclusions submitted by Counsel. When I say they were "derived", rather, I culled with various modifications from those suggested findings and conclusions.

Now, throughout my discussion I'll probably refer to the Oneida case. If I do, it encompases the Supreme Court Decision in the case, various Court of Appeals Decisions, and my previous Decisions as they are applicable to the particular cir-

cumstances embodied in reference. I think that I ought to probably make a caveat in view of some of the arguments that have been made that I will use the words "ceded" and "conveyance" and words of similar import with reference to the effect and purpose of the 1795 Treaty and by doing so I in no way intend to leave an inference that I'm, by the use of that language, legitimatizing or validating the purported transfers that were made by that instrument and which I held to be invalid and of no effect.

For our purpose at the present time, I think we can treat the trial as having been bifurcated. The first part decided in 1977 by me determined the issue of liability in favor of the plaintiffs and against the defendants. I may state in relation to that, that I thought I made it pretty clear that the plaintiffs had standing and were the proper parties to institute the action. I'm repeating it because the argument was again raised. The trial that occupied a few days recently related to the specific amount of damages, if any, to which the plaintiffs are entitled. Ordinarily, the determination of the amount of damages awarded is regarded as the most important part of a case. Counsel generally look to the last line of the Decision to see how many dollars are involved. In this particular instance, I don't think that's the case. I feel in this case, and I have expressed the feeling before, that the determination that was made in 1977 by me, that the defendants were liable to the plaintiffs, was of much greater importance in the context of the entire problem than the number of dollars that happened to be awarded.

A brief review of the efforts to obtain a definitive Appellate Court ruling before the damage trial might be well at this time.

In 1977, in my Decision holding the defendants liable to the plaintiffs, because the plaintiffs, I found, were occupying the particular subject land in violation of the Non-Intercourse Act, I made certification required under 28 USC Section 1292(b),

that would permit an appeal from that Decision. Reference is made to the Oneida case at 434 F.Supp. 527 at Page 548. The appeal from that particular determination was aborted when the parties stipulated to withdraw the appeal. Considerable time elapsed during which hopefully, I think, I -- I can't speak for anyone else -- thought that it might be possible that some disposition, other than a court disposition, could be made of the issues involved here.

However, that was a hope that remained unfulfilled.

Recently, there was a motion made for a summary judgment based on the determination of the Oneidas' claim before the Indian Claims Commission and in the Court of Claims. In ruling on that motion, which I denied, I again granted the certification to appeal from that Interlocutory Judgment. An application was promptly made to the Court of Appeals for the necessary certification for leave to appeal and it was granted. Unfortunately, from my viewpoint, after the appeal was perfected and argued in the Court of Appeals of this Circuit, that Court dismissed the appeal as improvidently granted so that another opportunity to get a definitive Appellate Court Decision on what I considered to be the important phase of the case, that is, the liability, was missed. I apparently don't give up as readily as I should and still, having that same viewpoint paramount in my mind, urged the parties to attempt to stipulate for the purposes of this trial, only, the amount of damages so that an appeal could go forward promptly.

That suggestion proved impractical. After that, the parties engaged in lengthy preparation for this trial phase, or this damage phase of the trial. That preparation included extensive and extended discovery, including the Freedom of Information Act suit, and an appeal, *County of Madison* vs. *The United States Department of Justice*, 641 F.2d 1036, First Circuit 1981. So that ultimately we have reached this trial of the damage issue which was, which occupied much more time

than I think it should have, and I think I'm responsible for that by reason of the liberality with which I received evidence and ruled on the reception of that evidence. But this case was of sufficient importance so that an appeal should, in my mind, be on the most complete kind of a record.

Some place earlier in this proceeding, I commended the plaintiffs for the manner in which they sought to have this problem resolved. I repeat that commendation. The plaintiffs here have sought to have their rights to the land ceded in the 1795 Treaty determined in the least disruptive fashion to the present owners and occupants of it. They brought this present action in 1970 and some time later, I think, or maybe earlier, designated it as a test case, and rather than seeking ejectment or damages for the almost two centuries of alleged illegal occupancy, they sorted the defendants out, selected the two counties, and sued only for the damages for the use and occupancy of the county lands during 1968-69. This is in sharp contrast to the methods employed in other similar situations, for instance, I had the Mohawk case.

In that case, they applied self-help. The Mohawks merely went up in the Adirondacks, took over a piece of land that they claimed was within their aboriginal land, and seized it and held it by force. That situation is described in *New York* vs. *White*, 528 F.2d 336, Second Circuit 1975. At the same time, New York State instituted an action in this court, various property owners instituted actions in State Courts which resulted in a compromise being reached between the Mohawks and the State of New York, I think, by which some land up in northern New York was transferred to the Mohawks along with various other stipulations, but it was resolved and not in a court; although I'm sure that the State Court's determination and this Court's determination had something to do with the compromise that was ultimately reached.

The plaintiffs make claim in their memorandum in support of the proposed Order and the measure of damages at Page 2 the limited nature of the relief being sought. On Page 2 of that memorandum they state, "The Oneidas do not seek to expand the relief sought beyond the original test case". In their Complaint, the Oneidas sought damages for the counties' illegal use and occupancy of Oneida land during 1968 and 1969.

At the damages trial, the Oneidas intend to offer proof of their proposed measure of damages for the years 1968 and 1969 only. Neither do the Oneidas intend to pursue their right to evict the counties in this action."

So that our issue here was well defined and limited. The specific plots of land occupied by the defendants were not particularized in the trial of the liability issues. The parties, however, stipulated that the parcels occupied by the defendants prior to and in 1968 and 1969 and of which they were and are the record owners and possessors, are part of the land transferred in 1795, that was at Page 6 of the transcript of the liability trial.

Anyone with any experience with litigation knows that it is not unusual for litigants to take extreme positions in furtherance of their respective causes. The parties have done so in this case in relation to the damages. The plaintiffs claim the highest possible amount as damages while the defendants assert damages are non-existent. To me a fair disposition supported by law lies between these extreme positions.

A statement of the law to be applied is not difficult. The parties are in accord that under the Supreme Court Decision in this case the applicable law is the Federal Common Law, "the governing rule of decision would be fashioned by the Federal Court in the mode of the common law." That's from the Oneida case at 414 U.S. at 674. From that point on there's "divergence" of course in the views of the parties. They differed greatly as to how the common law should be fashioned

but they agree, again, that the principal objective in fashioning the applicable law should be "the vindication of Federal preeminence in Indian affairs", Defendants' Reply Memorandum, Page 16.

The parties see the means of vindicating Federal preeminence in quite different ways. The defendants arguing that this can be achieved only "by granting these claimants no relief whatsoever". There is no mistaking the position there. The quote ended with "whatsoever". Defendants' Reply Memorandum on Page 18.

The plaintiffs say vindication requires awarding the highest possible damages as rent computed on the basis of the occupied land with the improvements as they existed in 1968 and 1969. As a fall-back position, the defendants argue that if damages are to be awarded, that the Federal Common Law should be fashioned by the virtual wholesale adoption of New York State law, case law and statutory law both.

In applying that law, the defendants say that any damages sustained by the plaintiffs should be "reduced by the aggregate of the following: (a) The value of all consideration received by the Oneida Nation at the time of the transfer of the subject property in 1795. (b) The value of all subsequent payments received by the Oneida Nation or any of the plaintiffs pursuant to the 1795 transaction, including any annuities received and any capitalized annuity payments made. (c) The value of the use by the plaintiffs themselves including any members of the plaintiff tribal entities of the County lands, roads, and facilities within the claim area during the two-year period at issue." Defendants proposed findings of fact and conclusions of law, page 14.

As was indicated on the oral argument, although I don't think anybody made any computations, that reduction by the aggregate of the items claimed by the defendants would result in a verdict of no damages. As I have indicated the plaintiffs

want a Judgment reflecting the fair market value, the fair rental value, rather, of the lands as of the improved 1968-1969 condition; that is, with the highways built and so forth. And, in addition, damages for "waste or other injuries to the land" with interest at the prevailing rate on prudent investments. Plaintiffs' joint proposed findings of fact and conclusions of law, page 10.

That there was a federal and is a Federal Common Law applicable, I think, is pretty clear. Long before the adoption of our Constitution, the English Common Law recognized an action for damages which is incorporated into our common law, resulting from the unlawful occupation of plaintiffs property. As a matter of fact, I remember, it's over fifty years now so that my recollection is somewhat vague and hazy, but I do remember that in law school in some course, either Real Property or Common Law, I remember the professor talking to us abut a "Trespass Quare Clausum Freight"; that may be what we have here. I am not sure if you have to give it a name, but the principle, however, has been applied in the Federal Courts for ages.

The unlawful use and occupation of land entitles the plaintiffs not only to recover the land but to damages "measured by the reasonable value of the use and occupancy considering its extent and duration", *Utah Power and Light Company* vs. *United States*, 243 U.S. 389-411, 1917. And in dealing with this entire subject, I think it is well to keep in mind what was said in *United States* vs. *Gilbertson, et al.*, 111 F.2d 978-980 (7th Cir., 1940), that "in general statutes passed for the benefit of dependent tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians," citations omitted.

Both parties, as I have indicated, agree that vindication, preservation of the preeminence of the United States in Indian affairs should be the guiding principle behind the fashioning

of a common law remedy. Plaintiffs, of course, have said that in order to fashion appropriate law that their damages should fully compensate them and deprive the defendants of any profits or benefits by reason of their unlawful use of the land.

The defendants say that the only way that this principle of Federal preeminence in Indian affairs can be vindicated, can be achieved, "only by holding that the Oneidas are entitled to no relief whatsoever", Reply Memorandum of defendants on the issue of remedies, pages 16-18.

As I indicated earlier, I find it impossible to accept either of these views.

The defendants also claim that traditionally damages have not been awarded for violations of the Non-Intercourse Act and that violators are not called upon to respond in damages. They also say that by granting them the offsets that they seek would not at all be inconsistent with applicable law or with the vindication of Federal preeminence. They also meet the argument of the plaintiffs that the Counties are bad-faith occupiers by saying that, of course, if New York State was in bad faith, that is one thing; but the sins of the State do not fall on the Counties of the State under these facts.

Their argument, the defendants' argument that damages, again to the claim of lack of implied cause of action. They distinguish the cases that have awarded damages by pointing out that in those cases there were violations of statutes relating to allotments rather than violations of the Non-Intercourse Act. To support that argument, they point out that the allotment cases derive viability from the General Indian Allotment Act of 1887, 25 USC, Section 345. That section is inapposite. All that does is afford District Court jurisdiction over allotment claims. There is no question about the jurisdiction that this Court has. I learned that lesson from the Supreme Court in this case so that nobody can argue jurisdiction here. This Court had jurisdiction and in determining that this Court had

jurisdiction, the Supreme Court, of necessity, found that the Complaint alleged a claim entitling the plaintiffs to relief. That, if not explicit, was certainly implied in the Supreme Court Decision in this case.

The defendants read the Supreme Court Decision as limited to a finding of jurisdiction. But merely assuming, without deciding that a valid claim had been asserted and they quote from *Burks* vs. *Lasker*, 441 U.S. 471, at page 476, Note 5 that the "question whether a cause of action exists is not a question of jurisdiction and, therefore, may be assumed without being decided". The assumption, however, is made on the basis of pleadings alone. There aren't any facts. We have had a trial here. Right or wrong, I've decided that the defendants were liable.

The defendants also argue that many of the cases upon which the plaintiffs rely "do not even award the plaintiff damages or alternatively do so without the benefit of any discussion as to whether there is an appropriate remedy"; Defendants' Reply Memorandum on the issue of damages, page 33.

To my mind it is too late in the day to credit this argument. There are many cases cited in the parties' Briefs and the earlier Opinions in this case that have, in fact, awarded damages. And some of the cases, the more extreme remedy of removal of the illegal occupant has been ordered and in all of the cases the occupant was in a chain of title derived from a conveyance by Indians executed in violation of the statutory restriction on alienation. As a result of which, as it was found in this case, the conveyance was void. For example, *Heckman* vs. *West*, 224 U.S. 413, 1912, *United States* vs. *Boylan*, 265 F.2d 165 and I am sure that you could go on with citations in a string, if you were so inclined.

The defendants in support of their claim that Federal primacy in Indian affairs can only be vindicated by denial of

damages to the piaintiffs present a convoluted thesis. The principle thrust of the argument is a reassertion of the non-justiciability and the lack of implied cause-of-action arguments. These were made earlier. I have ruled adversely to the defendants. Those arguments did not, in my opinion, support a dismissal for failure to state a claim after a trial. They do not support a denial of damages. I think what's been missed here, when you talk about implied causes of action under the Non-Intercourse Act, is that it is not necessary to seek out an implied cause of action. This old common-law action of trespass will do very well. Why be inventive? You're going to invent the wheel all over again. Then defendants go on placing under the rubric of the vindication of Federal preeminence in Indian affairs and presented argument that the Treaties of 1978 and 1802 were offered and received in evidence in the liability trial. There is no argument about that.

But they maintained that those Treaties constitute a ratification of the 1795 conveyance. If I am not mistaken, and I don't think I am, that same argument was presented on more than one occasion earlier as a plain ratification argument. It's now been placed under the requirements for vindication -- it's now been plced under the vindiction argument but it is the same argument dressed up in a new costume. The costume makes it no more effective nor neither does the repetition. That suggests to me -- perhaps I should digress for a minute to just explain that this is a District Court, this is the bottom rung of the hierarchy of the Federal Judicial System. The District Court has not and none other than the Supreme Court has the luxury of refashioning what appears to be existing law by reason of contemporary times or conditions. That luxury resides solely in the Supreme Court of the United States. And in saying that, I recognize that it's necessary to make the arguments here to avail one's self of them in the higher courts. So that while if I appear a little edgy about repetition, it's with a re-

cognition of the necessity for making the arguments here but this argument about the 1798 and 18 -- 1794, 1798, 1802 Treaties are really nothing more than what country lawyers would refer to as incorporation by reference in a Deed. It boils down to the claim that reference in a Deed to a metes and bounds description of the boundry line used in a previous conveyance constitutes a ratification of the validity of the earlier conveyance. It just doesn't add up. All the elements necessary for ratification, I find, are missing.

Further, the matter of ratification is the defense that should have been in, and in fact, was raised in the liability trial. In my Decision in that phase of the case, after finding that the 1795 Treaty was not consented to by the United States, I said, "No evidence of any subsequent treaty or act of Congress ratifying the transaction was offered. The Federal consent required by the Non-Intercourse Act was not obtained before or after the fact", 434 F.Supp. at 538. Nothing has been changed and nothing has been brought to my attention up to this point to change that statement.

The plaintiffs' view of the damages to which they are entitled requires that rent be computed for the subject land with the improvements existing on it from 1968 and 1969, and with all of the profits that would be derived from those improvements; if there were a skyscraper on it, the rent being paid by the tenants, the actual tenants of the space would be part of the damages to which the plaintiffs would be entitled.

The defendants, as I indicated earlier in summing up their arguments, say that any damages that are given to the plaintiffs must have from that sum deducted these other monies they have received and so forth and including the use by the plaintiffs and their members of the roads and other public facilities. In other words, most of us could use these county roads in Madison and Cayuga County without paying anything. As far as the Indians are concerned, they become a toll road; that is about the effect of it.

I think somebody smiled when they threw that one at me. Of course, that position is neither supported by the law or the facts and just on the face of it, it would seem terribly inequitable to deduct the amount that the plaintiffs received for land illegally used by interlopers for almost two hundred years against an award covering approximately one percent of that time. I indicated that I could not adopt either claim as to damages. This is a case, probably, that the Court will have to rely on Gilbert and Sullivan for precedence and "let the punishment fit the crime."

I recognize that plaintiff's argument to vindicate and to give the tribe damages as to means of vindicating the federal supremacy is not treated, at least by them, as a penalty. But it seems to me that the policy of the Non-Intercourse Act in the light of the facts and the claim made here can be done with far less draconian methods.

The plaintiffs argue at some length and with some sincerity, I am sure, that the entitlement to these large damages that they have claimed arise out of the bad faith of the defendants. I recognize that good fairth is not a defense to a common-law action for damages for unlawful use and occupancy of land. However, even under the oldest cases a good-faith occupier was permitted to offset the value of the improvements against the damages, *Green* vs. *Biddle*, 21 U.S. 1, 1823. Plaintiffs say that the State of New York not being an occupant in good faith, and the defendants don't feel it is necessary to defend the State of New York at least on this argument, just say that, that unlike the plaintiffs who claim that the defendant counties, the successors in the chain of title to the State of New York, stand in their shoes.

The defendants say that isn't so. There is no bad faith, and that they don't succeed to the bad faith in the State of New York.

I am inclined to agree with the defendants insofar as the right to occupancy is concerned and no matter what, I don't think it's necessary to treat the counties as bad-faith occupiers for the purpose of assessing and fixing damages. The bad faith consisted of the violation of the Non-Intercourse Act by the State of New York. Counsel have referred to the knowledge on the part of the State of New York of the requirements of the Non-Intercourse Act and the liability trial had much historical data to support that law.

However, there is no evidence to connect the defendants, these two counties, with that act of bad faith; nor is there any other evidence indicating that they were bad-faith occupiers of the land in 1968 or 1969 and, of course, we are not concerned in this case with any other time. As a matter of fact, there is no evidence as to when or how the counties acquired this land. The Wooden Ware case that was referred to by the Counsel as supporting their view, I think is distinguishable on the facts, as I think I pointed out during the argument. In that case, the good-faith purchaser was merely being held in damages for the increment that he received at the hands of the trespasser or the culprit. He wasn't, and the Court didn't fix, liability on him for improvements that he put in, if any, that he put into the wood that he acquired, the timber that he acquired from the trespasser. And while the Supreme Court Decision doesn't show what happened with the particular timber, I don't think you have to have much of an imagination to think that by the time the case reached the courts that it was in some condition other than the posts or logs or whatever that he bought from the Indian trespasser.

The *Russian American Packing Co.* vs. *United States* case, 199 U.S. 570, relied on by the plaintiffs is also inapplicable. In that case the plaintiff seeking recovery with the value of improvements it made on the land was not an occupier in good faith. It "was a mere trespasser in occupying the land without

a shadow of title", 199 U.S. 579. I think the courts have established that in Indian allottee, or tribe seeking to cancel or to declare a conveyance made in violation of the Non-Intercourse Act void, is not required to return the consideration received as a prerequisite to maintaining the action. But as clear as that rule appears to be, even that apparently is not absolute. Even in such a case the Court has not ruled out the possibility that under some circumstances a return of the consideration might be required, *Heckman*, 224 U.S. 447.

And in other cases the Courts have indicated that they are not adverse to ameliorating the harshness of the offset rule under appropriate circumstances if the principle, of Federal supremacy is not disturbed and is equitable. In *United States* v. *Brewer*, 184 F.Supp. 377, District of New Mexico, 1960, although the Court entered an Order of Eviction against the unlawful occupants of Indian land who had erected improvements on it, I think to the extent of some $9,000 which was apparently regarded as substantial in the case, the Court stayed the eviction for six months and also permitted defendants to take as much of the improvements and building materials as they were able to. In *United States* vs. *Forness*, 125 F.2d 928, a case arising in this Circuit in 1942 to which reference was made in my liability Decision, the Court there granted a cancellation of a lease with the Seneca Nation of Indians.

In some facets, this case is reminiscent of that one. That case involved a four-dollar lease but there were hundreds of others. This case involves a relatively small piece of land within a much larger area. In any event, the Court, while entertaining a Decree cancelling the lease because it violated an alienation disqualification, required that the Senecas keep open an offer to lease under different terms for a period of sixty days.

Now, that offer to lease had been earlier made by the Senecas in my mind denying the request to fix the rental on the

basis of the existing proof, that is, highways run into millions of dollars and denying that request is equitable and does not do violence to the principle of Federal supremacy.

In getting down to evaluating the dollar worth of the unlawful use and occupancy of this land for two years, a difficult problem is presented. Of course, it is unique in that it is Indian land and it is unique also in the very differing degrees in which the parties see the damages. The usual case fixing rental isn't a terribly tough chore; experts come in; the building across the street was rented for a certain amount, the building next door was rented for a certain amount during the period; and you get pretty good guidance. But here we are dealing with a much more difficult factual situation but that doesn't mean it can't be done, that it isn't a question that can't be handled. Courts every day put dollar signs on, I think, much greater imponderables. They put a dollar sign on the pain that a plaintiff suffers, pain that nobody else in the world can feel. The Courts that are able to do that, I think, can fix damages with some degree of reasonableness and equity in a case such as this.

I mention that in passing because the argument has been made that this was a matter not only inappropriate for Courts to handle but which Courts were unable to handle. Searching around for a basis upon which to fix damages. This is not an eminent domain case, obviously. Eminent domain, the State or government would be taking the land lawfully and they would be required only to pay due compensation, assuming, of course, the other elements of the taking are met.

Here the taking was unlawful but it still boils down to this: That plaintiffs were entitled to possession the same as any landowner is before an eminent domain and he was deprived of that possession by the conduct of the defendant so that the damages sustained by both plaintiffs can be viewed as substantially the same and, generally speaking, the rules of eminent

domain could be applied here and do justice to the parties. This is by reason of the delicacy or consideration with which the plaintiffs brought on this action with only -- we are only dealing with what amounts to a two-year occupancy or an easement for two years so that that is the view that I would be obliged to take. I can't say that I wasn't confused by some of the evidence concerning the damages and the value. A good deal of it took on the aspects of how many angels can dance on the point of a pin, as far as I am concerned. In fact, one of the witnesses I think aptly described some of the assumptions as "fantasy".

I would endorse that viewpoint. In fact, under the defendants' testimony it was like listening to the story of Rip Van Winkle. Somebody went to sleep in 1795 and woke up it 1968. Maybe I will be Rip Van Winkle when the Supreme Court gets through with this case, I don't know.

In any event, the evidence that I received from the defendants as to the value I gave no weight, practically no weight at all. The approach that I think was fairly presented and from which damages can be determined was the approach used by plaintiffs' experts in what they described as "across the fence value". That is, they looked at the land, not as the defendants' witnesses did, as it existed in 1795, but the plaintiffs looked at it as it existed in 1968-1969. What you find then are a park, gravel pit, a radio tower, roads running through a county. But now would you evaluate these smaller parcels there seems to be little or no dispute about except when we get down to the defendants' blanket evaluation of three or four dollars a year per acre? That was it, and the defendants, of course, --then I am not sure at one time the defendants' expert viewed the entire countryside as it existed in 1795.

In another part of his testimony, I got the impression that he viewed the county lands, envisioned them in 1795 and the surrounding areas in 1968-69. There were two time periods. We

got a dense, some kind of a forest or wilderness running where these roads are, farms, cities, urban communities, what-not on either side. That I think the witness himself called "fantasy".

The approach that was appealing was the approach of the plaintiffs that determined the value of this road and the other properties on the basis of the conditions as they existed; that is, part of this highway, I'm sure, was much more valuable, or I should say, more valuable than other parts and he divided the areas up and alloted to each particular area an evaluation.

He found that the Madison County-Champlain Park consisted of forty-seven acres at $225 an acre and the total value, market value of $10,060. The only evidence -- I don't think there was any evidence; if there was, it came under the catch-all of $30.00 an acre for the defendants' view which I didn't adopt. The rental was fixed at five percent of the value or $530. That figure I accept.

The radio tower, a small item of virtually two acres, was computed to have a fair market value of $1,750 by the plaintiffs' expert and $60.00 by the defendants'. I think that the plaintiffs' expert demonstrated a much sounder base and impressed me as not exaggerating the value of the property and I accept his valuation. He computed the rent at ten percent of that or $175 and that is accepted.

The Madison County roads he found needed three different classifications. He found that there was about 322 acres which would be classified as the highest and best use for agricultural or recreational land and he valued that at $125 an acre. He found fifty-four acres having the highest and best use of residential and three acres having the highest and best use for commercial purposes. These were evaluated at $750 an acre for residential and $1,400 an acre for commercial land, making the total fair market value of $85,000.

The defendants applied, as they did to everything, thirty to forty dollars an acre which I gave no weight. I considered it but I don't think it was deserving of weight based on the supporting basis upon which the valuations were made. All of the experts did agree, however, that in fixing the value of a rental or easement in this area that the uniformly-acceptable standard was to fix it by taking the market value, fair market value, multiplying it by ninety percent and then multiplying by five percent, and that is, five percent of ninety percent of the value, fair market value. Computed on that basis, the $85,000 fair market value for the rental or value of the easement for the two years would be $3,825.

The smaller parcels, the Champlain Park and radio tower, were found to have the highest and best use in accordance with their present use. Under these computations, the plaintiff during the two years has been damages by the unlawful occupancy by Madison County to the extent of $9,060. With reference to Oneida County, the defendants' expert made no appraisal at all, if I recall. If there was an appraisal, it would come under his catch-all thirty-five dollars-an-acre which I cannot accept for the same reasons that I could not accept the defendants' expert with reference to Madison County lands.

The plaintiff found that there was a gravel pit of thirteen-some acres which had a fair market value of $7,200. This is undisputed and accepted. He fixed the fair market value at $550 per year, which is also accepted. I think, which also is undisputed, the defendants' expert said he made no appraisal of the gravel pit.

With reference to the roads, an examination of the area through which the roads run places approximately 400 acres in the agricultural and recreational land highest and best use, 30 acres within a residential highest and best use. The agricultural-recreational land was appraised at $125 an acre, the residential land at $750 an acre; making a toal valuation of

the unimproved land for the Oneida County roads of $72,600. Applying the formula which all of the experts agreed upon would result in $3,267 per year. The total fair market rental value or damages sustained by reason of the Oneida County's unlawful occupancy of the land comes to $3,817, that's treating the highest and best use for the roads, as I have indicated, and the highest and best use for the gravel pit as a gravel pit, a partially-worked gravel pit.

With reference to damages relating to waste from the gravel pit, I recall no testimony. I don't know that anything was taken from the gravel pit during the years in question so that the total damages sustained by the plaintiffs at the hands of Oneida County for two years is $7,634.

We now come to the question of interest. I had no problem with finding that the plaintiffs are entitled to interest. They were deprived of the use of their land during these two years. That deprivation has a dollar figure. And the interest should be part of their damages. The manner of computing the interest raises a problem. The Intercourse Act, the cases to which I have been referred as far as I was able to see, offer no instruction as to how to compute the interest. In this particular case, barring some absolute requirement, I feel it would not be inappropriate to look to the law of the State of New York for guidance. I have done that and I have incorporated New York law as I feel it is applicable and equitable to the verdict here. The defendants are counties. We all know the rules that the Legislature has provided, rules for the fixing of interest in the case of Judgments and claims against counties, against municipalities, under New York General Municipal Law, Section 3(A)2. Interest against municipalities is limited to three percent, except in the cases of condemnation and wrongful death; in which cases it is six percent.

Technically, this is not, as all Counsel seem to agree, well, obviously not a wrongful death and Counsel seem to agree that technically it is not a condemnation suit; however, the rule of

damages in condemnation suits has been referred to, and I think appropriately and I think that the rate of interest to be applied in condemnation suits provides the best guide under the facts of this particular case. The damages here parallel the measure of damages for acquiring temporary easement for road purposes or other purposes. Possession by the municipalities was acquired without the consent of the rightful owner and adapting New York Law of Interest as it relates to claims and Judgments against counties, I think it is appropriate to fix interest at six percent per annum.

There is probably some housekeeping that we should do. There were motions made, or at least one that I can recall, to strike one of the expert's testimony on the value of the appraisal. The motion is denied. As I indicated earlier, this dictation on the record, coupled with some partial findings which I will file with the Clerk, copies of which will be available to Counsel right after the trial, right after my dictation here, together with all of the other Opinions and proceedings in the case constitute the findings of fact and conclusions of law.

I will dictate a very short Order this afternoon directing the Clerk to enter Judgment in favor of the plaintiffs and against the defendant County of Madison in the sum of $9,060 with interest at six percent per annum from January 1, 1968, and a Judgment against the defendant County of Oneida in favor of the plaintiffs in the sum of $7,634 with interest at six percent per annum from January 1, 1968.

Judgment in those sums will be entered forthwith.

Now, can anybody help me, the third party, I haven't thought of looking it up earlier, but the third-party action here has not been disposed of, obviously. Is it necessary for me to make certification of some kind where Judgment is entered against fewer than all of the parties?

MR. Van GESTEL: If your Honor please, Rule 54(b) addresses the situation and it suggests when there are multiple

parties or when there are cross claims or third-party claims in the absence of such a determination by the Court there will be no final Judgment, that is then appealable, so you would have to make a ruling under that particular section.

THE COURT: I will include such a statement in my direction to the Clerk.

MR. Van GESTEL: Your Honor, may I come back to what I had said earlier? However, I think the resolution of the claim over is purely a matter of law and I would like to file a motion and a Brief so it could be heard.

THE COURT: I am not going to hear argument. I think it is time to, as I said before I guess in disposing of one of the motions, time to get this show on the road. That is what we are going to do. This is a Final Judgment from which an appeal can be taken.

Anything further?

MS. LOCKLEAR: No, your Honor.

THE COURT: Well, I don't suppose there is that much urgency. The Clerk will, of course, forward his Judgment card or whatever he does in relation to the entry of Judgment. I want to thank Counsel again.

Stand in recess.

The Clerk will return all the exhibits to the parties who supplied them. The parties can make them available to any Appellate Court. They won't get lost again that way.

COURT CLERK: Court stands in recess.

CONCLUSION OF PROCEEDINGS

* * * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

The ONEIDA INDIAN NATION OF NEW YORK STATE, et al.,		
Plaintiffs,		
v.		No. 70-CV-35
The COUNTY OF ONEIDA, New York, and the County of Madison, New York,		
Defendants and Third-Party Plaintiffs		
v.		
THE STATE OF NEW YORK,		
Third-Party Defendant.		

ORDER [OF OCTOBER 5, 1981]

The above-entitled action came on for trial before the Court at the United States Courthouse at Auburn, New York on September 14, 15, 16 and 17 and the Court having heard the evidence, and the motion to dismiss at the close of all of the evidence was deferred for argument to October 5, 1981, and the Court having heard and considered the arguments of the parties and having dictated its decision, findings of fact and conclusions of law and having filed additional partial findings of fact and conclusions of law, and upon all of the proceedings heretofore had herein, it is ORDERED:

1. The defendants motion to dismiss be and it hereby is denied;

2. That the Clerk enter judgment in favor of the plaintiffs against the defendant County of Madison in the sum of $9,060, with interest at six per cent per annum from January 1, 1968; and judgment in favor of the plaintiffs against the defendant County of Oneida in the sum of $7,634 with interest at six per cent per annum from January 1, 1968 and

3. That pursuant to the provisions of 54(b) Fed. R. Civ. P. the Court finds and hereby makes an express determination that there is no just reason for delay in the entry of final judgment.

/s/ Edmund Port
Senior U.S. District Judge

Dated: October 5, 1981
Auburn, New York

NOTICE OF JUDGMENT [OF OCTOBER 5, 1981]

CLERK'S OFFICE
United States District Court
FOR THE
Northern District of New York

Oneida Indian Nation of N.Y.,
et al
vs. Civil Action No. 70-CV-35
County of Oneida, et al

There was entered on the docket Oct. 5, 1981 an order & (judgment) in favor of plaintiffs & against County of Oneida in sum of $7,634 & against County of Madison in sum of $9,060 — both w/int. at 6% per annum from 1/1/68. JR. SCULLY, CLERK

United States District Court

Northern District of New York

THE ONEIDA INDIAN NATION OF
NEW YORK, et al.,
Plaintiffs,
v. CIVIL ACTION NO.
70-CV-35

THE COUNTY OF ONEIDA,
NEW YORK, et al.,
Defendants.

Notice of Appeal of the Counties of Madison and Oneida, New York.

Pursuant to Fed. R. App. P. Rules 3 and 4, notice is hereby given that the defendants, the Counties of Madison and Oneida, New York, hereby appeal to the United States Court of Appeals for the Second Circuit from the final judgment of this Court, Port, J., entered in this action on the 5th day of October, 1981, and all adverse interlocutory judgments and orders heretofore entered herein.

Respectfully submitted,

_____

Allan Van Gestel
Tobin N. Harvey
GOODWIN, PROCTER & HOAR,
28 State Street
Boston, Massachusetts 02109
(617) 523-5700

Dated: October 28, 1981.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighteenth day of February one thousand nine hundred and eighty-two.

Present:

HONORABLE WILLIAM H. TIMBERS,
HONORABLE RALPH K. WINTER,
Circuit Judges,

ONEIDA INDIAN NATION OF
NEW YORK, et al.,
Appellees-Cross-Appellants,
v. 81-7786.
THE COUNTY OF ONEIDA,
NEW YORK, et al.,
Appellants-Cross-Appellees.

Appellants-cross-appellees having moved by notice of motion dated December 29, 1981 for a stay of the appeal (1) pending resolution of a claim by the Counties against New York, (2) pending termination of *Oneida Indian Nation* v. *United States*, No. 301 in the Trial Division of the United States Court of Claims, or (3) pending the decision in *Oneida Indian Nation* v. *New York*, Nos. 81-7616, 81-7618, 81-7626, 81-7628, 81-7638, 81-7646; or, in the alternative, a remand to the United States District Court for the Northern District of New York on either grounds (1) or (2) above, it is hereby

ORDERED that the case be remanded to the United States District Court for the Northern District of New York pending resolution of claims by the Counties against New York, and the motion for a stay of the appeal is denied.

/s/_____
WILLIAM H. TIMBERS, U.S.C.J.

_____
RALPH K. WINTER, U.S.C.J.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

United States District Court

Northern District of New York

THE ONEIDA INDIAN NATION OF NEW YORK STATE, also known as the ONEIDA NATION OF NEW YORK, also known as the ONEIDA INDIANS OF NEW YORK, and the ONEIDA INDIAN NATION OF WISCONSIN, also known as the ONEIDA TRIBE OF INDIANS OF WISCONSIN, INC.,

Plaintiffs,

-against-

THE COUNTY OF ONEIDA, NEW YORK and THE COUNTY OF MADISON, NEW YORK,

Defendants and
Third-Party Plaintiffs.

THE COUNTY OF ONEIDA, NEW YORK,
Defendant and
Third-Party Plaintiff,
-against-

Revised Notice of Motion to Dismiss Third-Party Complaint

STATE OF NEW YORK,
Third-Party
Defendant.

THE COUNTY OF MADISON, NEW YORK,
Defendant and
Third-Party Plaintiff,
-against-
STATE OF NEW YORK,
Third-Party Defendant.

SIRS:

PLEASE TAKE NOTICE that the undersigned will move this Court at a Term thereof for hearing of motions to be held on the 5th day of May, 1982, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, at the United States Courthouse at Auburn, New York, for an order pursuant to Rule 13(b)(1), (2) and (6) of the Federal Rules of Civil Practice dismissing the Third Party Complaint against the State of New York for (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, and (6) failure to state a claim upon which relief can be granted.

Dated: Albany, New York
March 2, 1982

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Defendant
The Capitol
Albany, New York 12224
Telephone: (518) 474-7173

BY_____
JEREMIAH JOCHNOWITZ
Assistant Solicitor General

TO: ROBERT MC DERMOTT, ESQ.
MADISON COUNTY ATTORNEY
112 Farrier Avenue
Oneida, New York

WILLIAM CALLI, ESQ.
ONEIDA COUNTY ATTORNEY
John Balzano, of Counsel
800 Park Avenue
Utica, New York 13501

GOODWIN, PROCTER & HOAR, ESQS.
Of Counsel to Madison and Oneida
Counties
Attn. Allan van Gestel
28 State Street
Boston, Massachusetts 02109

LAWRENCE A. ASCHENBRENNER
ARLINDA F. LOCKLEAR
Native American Rights Fund
1712 N Street N.W.
Washington, D.C. 20036

United States District Court

Northern District of New York

THE ONEIDA INDIAN NATION OF NEW YORK, et al.,
Plaintiffs,
v.
CIVIL ACTION NO. 70-CV-35

THE COUNTY OF ONEIDA, NEW YORK and THE COUNTY OF MADISON, NEW YORK,
Defendants and Third-Party Plaintiffs,
v.
THE STATE OF NEW YORK,
Third-Party Defendant.

Notice of Motion for Summary Judgment by the Counties of Oneida and Madison Against the State of New York

TO: Jeremiah Jochnowitz
Assistant Solicitor General
Department of Law
The Capitol
Albany, New York 12224

Arlinda F. Locklear
Native American Rights Fund
1712 N Street, N.W.
Washington, D.C. 20036

Bertram E. Hirsch
81-33 258th Street
Floral Park, New York 11004

SIRS and MADAM:

PLEASE TAKE NOTICE that upon the memorandum of law filed herewith, and all other papers and proceedings had herein, the defendant Counties of Oneida and Madison, New York, as third-party plaintiffs will move this Court, at the United States Courthouse, Auburn, New York, on Wednesday, May 5, 1982, at 10:00 a.m., or as soon thereafter as counsel can be heard, for the entry of summary judgment pursuant to Fed. R. Civ. P. Rule 56, against the third-party defendant, The State of New York, on the grounds that there is no genuine issue as to any material fact on which this motion is based and the third-party plaintiffs are entitled to judgment as a matter of law.

Pursuant to Local Rule 10, there is annexed to this Notice of Motion a separate, short and concise statement of the material facts as to which the third-party plaintiffs contend there is no genuine issue to be tried.

Dated: March 5, 1982.

THE COUNTY OF ONEIDA, NEW YORK
and THE COUNTY OF MADISON, NEW YORK

By their attorneys,

/s/_____

Allan van Gestel
Frank Dennis Saylor, IV
GOODWIN, PROCTER & HOAR
28 State Street
Boston, Massachusetts 02109
(617) 523-5700

Annex to Notice of Motion.

Pursuant to Local Rule 10, the third-party plaintiffs herewith submit their statement of the material facts as to which they contend there is no genuine issue to be tried.

1. The claim made by the plaintiffs in this case ("the Oneida Indians") seeks damages for the use and occupancy during the years 1968 and 1969 for those portions of certain land purchased by the State of New York from the Oneida Indians pursuant to a treaty entered into in 1795. The plaintiffs contend in essence that the transfer of land by the 1795 treaty to the State of New York violated the Trade and Intercourse Act of 1793, claiming that the sale was not made with the consent or approval of the United States.

2. On July 12, 1977, this Court found liability against the Counties. The liability was based on the Court's determination that the facts showed that the 1795 transaction between the Oneida Indians and the State of New York did not have the requisite Federal approval and, therefore, was void as a violation of the Trade and Intercourse Act of 1793. *Oneida Indian Nation of New York* v. *The County of Oneida*, 434 F. Supp. 527 (N.D.N.Y. 1977). All of the facts found by the Court are incorporated herein by reference for purposes of this motion. It does not seem necessary to set forth the facts found by the Court in affidavit form.

3. On October 5, 1981, this Court entered Partial Findings of Fact and Conclusions of law which included, in Findings 22 and 23, the facts that:

(a) "the counties of Madison and Oneida, New York, were not in existence in 1795 at the time of the transaction complained of in this action"; and

(b) "no evidence has been presented to show that the Counties . . . acted other than in good faith when they came into possession of the County Land in the claim area subsequent to 1795 and prior to January 1, 1968."

4. On October 5, 1981, this Court entered judgment against the Counties in favor of the plaintiffs as follows:

(a) Against the County of Madison, $9,060; and
(b) Against the County of Oneida, $7,634.

The Court also ordered that interest in the amount of 6% per annum run on the foregoing amounts from January 1, 1968.

5. The third-party plaintiffs believe that all facts on the issue of their liability to the Oneida Indians and the only facts of significance as between the Counties and the State have been determined by the Court. All that remains are issues of law.

6. The third-party plaintiffs, therefore, respectfully submit that they are entitled to summary judgment against the State of New York on the following grounds:

(a) The law in the circumstances here presented requires the State to indemnify the Counties since the State is the party which actually committed the wrongful act;

(b) The State by statute has waived its Eleventh Amendment immunity from the third-party claims asserted by the Counties. This waiver is contained in either N.Y. Real Prop. Acts. Law § 1541, or N.Y. State Law § 10, or both;

(c) Congress, by enacting 28 U.S.C. § 1362, abrogated the Eleventh Amendment immunity of the State in third-party complaints brought in actions concerning property rights in aboriginal lands; and

(d) N.Y. State Law § 10 requires the Governor, at the expense of the State, to defend actions such as this. The Governor has failed to do so. Therefore, the Counties are also entitled to recover those expenses and attorneys' fees incurred in the defense of this case and in the prosecution of these third-party claims.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

The ONEIDA INDIAN NATION OF NEW YORK STATE, et al., Plaintiffs, v.	No. 70-CV-35
The COUNTY OF ONEIDA, New York, and the County of Madison, New York, Defendants and Third-Party Plaintiffs v.	
THE STATE OF NEW YORK, Third-Party Defendant.	

[TRANSCRIPT OF DECISION OF COURT DICTATED FROM BENCH ON MAY 5, 1982]

Transcript of a Decision taken on May 5, 1982, at the United States Courthouse, Auburn, New York, before the HONORABLE EDMUND PORT, United States District Court Judge in and for the Northern District of New York, presiding.

APPEARANCES:

FOR THE PLAINTIFFS: (Oneida Indian Nation of New York)	ARLINDA F. LOCKLEAR, ESQ.
FOR THE DEFENDANT and THIRD-PARTY PLAINTIFF: (County of Oneida, et al)	ALLAN VAN GESTEL, ESQ.
FOR THE THIRD-PARTY DEFENDANT: (State of New York)	ROBERT ABRAMS, Attorney General of the State of New York,

By: JEREMIAH JOCHNOWITZ, ESQ.,
Assistant Solicitor General,
Of Counsel.

THE COURT: All right, Miss Locklear, Gentlemen, you people have all appeared before me on previous occasions and you know that my usual custom is to dictate my Decision on the record following the argument, or following a brief interval after the argument, in order to give me an opportunity to study any new material that might have been presented during the argument.

On this occasion, I want to compliment counsel on their presentation because there was, the matter was so completely covered in the Briefs that I think it left little new for counsel to explore in the oral arguments. I don't feel it is necessary for me to write or speak very much about this. If the case requires further proceedings, as it appears it will, I am sure that the Courts above will have plenty to say. In any event, realistically we all know that all I am doing is shooting the starter's gun. The determination at the finish line will result from a Decision other than this Court's.

It makes me think of Lincoln's Gettysburg address where he said, not realizing the impact of what he was saying at the time, that the world would little note nor long remember what we say here. Well, I think we can literally apply it. The important things will be said subsequently. The lawyers are intimately familiar with the background of this case; they've, some of you, have lived with it from its inception, as I have. Others are second generation. I guess the case has got a life of its own.

Very briefly, in the second part of the trifurcated trial that we had in this case, I found that the Plaintiffs were entitled to a Judgment in the sum of some $16,000-plus against, some part against the County of Oneida and part against the County of Madison for the occupation of various lands within those counties resulting from a violation of the Non-Intercourse Act of 1793.

The parties in the third phase of the trial, which we are not engaged in, which is a claim-over by the Counties against the State -- the parties agree that the claim based on indemnity presents no factual issues and can be decided upon the two motions that are presently before me.

The Third-Party Defendant, the State of New York, relies mainly, at least, on the State's sovereign immunity and the bar of the Eleventh Amendment as grounds for the dismissal of the claim against them.

In argument, I think it is fair to say that the State concedes that absent a waiver there would be jurisdiction. I say, "Absent a waiver". I am talking about a complete waiver to sue in the Federal Courts as well as the State. As I indicated during the argument, treating the State's claims generously, I think it can be said that they further claim, or they did further claim that indemnity does not lie, although it hinged to the subject matter jurisdiction, it seems, but they seem to take the position that you are barking up the wrong tree, Counties, because you

are talking about a claim that arises out of our acquisition in violation of the Non-Intercourse Act whereas in truth what you are complaining about relates to our disposition of the land rather than our acquisition. And it argues that the claim is a matter of State law and not Federal law which would result in a failure of Federal jurisdiction, Federal question jurisdiction.

The County, on the other hand, lays it claim principally on three statutes, two State statutes and one Congressional enactment. They say that the State has waived its immunities through the enactment of Section 1541 of the Real Property Actions and Proceedings -- does that end with an Act?

MR. VAN GESTEL: Law.

MR. JOCHNOWITZ: Law.

THE COURT: -- Law. And Section 10 of the State Law of New York and they additionally point to 28 U.S.C. Section 1362 as the basis of waiver. The Counties contend that it is entitled, or they are entitled to indemnification because, otherwise, the State would be unjustly enriched. They also put forward the contention that the Counties' violation found by the Court was in the nature of a technical violation resulting from their mere occupancy, possession of the land, whereas the State is the real culprit having initially violated the Non-Intercourse Act as the Court found.

As I indicated, I can see, I was going to say imagine, but I won't. I can see in the State's Brief that they say there is no right to indemnification but getting down to the core of the matter, the State stresses more strongly the immunity of the State which in turn revolves on whether or not there is a waiver of immunity to this suit.

In addition to the statutes, the Counties, en passante, almost whispered somewhere in their Brief that a waiver could result from, and I am quoting now, "Congress acting pursuant to the authority delegated to it by the States under the Federal

Constitution." Fitzpatrick -vs- Bitzer, 427 U.S. 445 (1976) . . . or by a particular course of conduct such as engaging in interstate commerce. Parden -vs- Terminal Railroad of Alabama, 377 U.S. 184 (1964." Memorandum of the County in support of the Motion For Summary Judgment, hereinafter the Counties' Memo, if I refer to it, at Page 9. Then lastly the Counties assert that since the Third-Party Complaint is within the ancillary as distinguished from the pendent jurisdiction of the Court, independent Federal jurisdiction is not necessary to support the third-party claim.

After a careful consideration of the Briefs and a review of the pertinent cases, I have concluded that the motion of the State to dismiss the third-party claim should be denied and the cross-motion of the Counties seeking indemnification should be granted.

Jurisdiction over the main action is unquestioned. The Supreme Court decided that. Otherwise we wouldn't even be here. The claim for indemnity obviously arises out of the same core of facts as the original claim, that is, the violation of the Non-Intercourse Act. Consequently, ancillary jurisdiction of the third-party action for indemnity exists, Dery -vs- Wyer, 265, F.2d, 804 (2nd Cir. 1959). Cited as authority in the Counties' Brief is the controlling law in this Circuit and has been consistently followed by the District Courts. E.G. Ayer -vs- General Dynamics Corporation, 82 FRD 115 (SDNY, 1979), Ross -vs- Penn Central Transportation Co., 433 F. Supp. 306 (WDNY, 1977). Aldinger -vs- Howard, 427 U.S. 1 (1976) does not destroy the jurisdiction of the Court over the indemnity claim asserted by the Counties against the State. In Aldinger, the Plaintiff attempted to assert an additional State-based claim against a Defendant over whom the District Court had no jurisdiction under 1983 as then construed. Section 1983, I believe it is Title 42, Section 1983. In this case, the Defendant Counties, Third-Party Plaintiffs, are asserting a

claim fashioned in the mode of the Federal common law, (I believe that was the expression used by the Supreme Court) against the Third-Party Defendant State which I find has subjected itself to the jurisdiction of the Court by both the enactment of the Non-Intercourse Act by Congress and, although I don't regard it as necessary, if necessary, its consent to jurisdiction by entering into the 1795 Treaty in violation of that statute.

By enactment of the Non-Intercourse Act, the Congress has abrogated the State's sovereign immunity. The State, by entering into the 1795 Treaty, has consented to subject itself to the jurisdiction of the Federal Court. I think Judge McCurn's case will support that as well. Oneida against State of New York, 520 F.Supp. 1278, 1307-1308.

For me, Parden -vs- Terminal Railroad Co. of Alabama, 377 U.S. 184 (1964) points the way to this result, the States "surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce", Parden at 191.

New York, along with the other original signatories to the Constitution, likewise surrendered a portion of their sovereignty by granting Congress the power "to regulate commerce with the Indian tribes", Constitution, Article I, Section 8, Clause 3. Pursuant to the power granted it by the Constitution, the Congress enacted the Non-Intercourse Act of 1790. The Act has not materially changed its pertinent provisions and is now codified at 25 U.S.C. Section 177. In pertinent part if provides, "*No purchase*, grant, lease or other conveyance of lands or of any title or grant thereto, from any Indian nation or tribe of Indians, shall be of *any validity* or equity" unless certain conditions were met. Now, I have underscored no purchase and any validity. It's been found that the 1795 transfer to the State violated the Act. As in Parden, when the Congress said, "*No purchase; any validity*"; it meant what it said and this included the purported grant by the 1795 Treaty, "When a State leaves the sphere that is exclusively its own and

enters into activities subject to Congressional regulation, it subjects itself to that regulation as fully as if it were a private person or corporation". Parden at 196.

The fact that the Non-Intercourse Act applies to New York, of course, supplies the major premise without which the Judgment in this case could not be sustained. The initial Judgment could not be sustained, if the arguments of the Counties are subsequently accepted that the Act doesn't apply to the State of New York. As the Court held in Parden to hold the State subject to the Non-Intercourse Act but immune from suit would leave the Act meaningless; it would tear the guts right out of it; it seems.

To paraphrase Parden, "It would be a strange situation indeed if the State could be held subject to the " -- I am inserting Non-Intercourse Act -- " and liable for a violation thereof and yet they could not be sued without its expressed consent. The State by " -- and again I am interjecting, procuring the conveyance of the land from the Oneidas so that rephrased Parden would read, "The State by procuring the conveyance of land from the Oneidas and thereby subjecting itself to the Act must be held to have waived any right it may have had arising out of the general rule that a sovereign state may not be sued withot its consent", citing Maurice -vs- State, 43 California Appellate 2d 270 at 275-277, 110 P.2d 706 at 710-711. In my view the fact that Alabama was operating a railroad business for profit in the Parden case doesn't dilute its authority.

In Fitzpatrick -vs- Bitzer 445 U.S. 445 at 451-452, (1976) the Court in distinguishing Edelman said, "Edelman went on to hold that Plaintiffs in that case could not avail themselves of the doctrine of waiver expounded in cases such as Parden -vs- Terminal Railroad Company, 377 U.S. 184, (1964), and Employees -vs- Missouri Public Health Department, 411 U.S. 279, (1973), because the necessary predicate for that doctrine was Congressional intent to abrogate the immunity conferred

by the Eleventh Amendment". The fact that it happened to be the railroad business I think was just a coincidence.

Congress by its enactment of the Non-Intercourse Act and its subsequent re-enactment after the adoption of the Eleventh Amendment, clearly evidences an intent to avoid the amendment's immunity.

As I indicated before, I think under the circumstances disclosed, the provision of the Constitution giving Congress the power to regulate trade with the Indians and the subsequent enactment and re-enactments of the Non-Intercourse Act indicate that New York's consent to this waiver isn't even necessary. Nevertheless, New York has by its conduct consented to jurisdiction in the Federal Court. Consent can be inferred from New York's treaty with the Oneidas. The treaty was executed on September 15th, 1795, about nine months after the ratification of the Eleventh Amendment. As a matter of fact, the State of New York was the first state to ratify the Eleventh Amendment so they quite apparently had a keen interest in the amendment which developed.

Kentucky was the ninth state providing the three-quarters of the states necessary to enact the Eleventh Amendment and they ratified the amendment on December 7th, 1794. At *that* time the amendment, of course, was effective under the Constitution. Article V, Dillon -vs- Gloss, 256 U.S. 368, (1921), held quite clearly that the amendment becomes effective in accordance with the express language of the Constitution upon its ratification by three-quarters of the states.

Now, peculiarly in looking for the effective date of the amendment, it appears that it was, I guess, years, a couple of years later before the President proclaimed the amendment had been ratified by three-quarters of the states. But without going into the questions of the timing I think it is indicative of New York's consent. Particularly treating the earlier action, the ratification date as December 7th, 1794. It would not

materially affect the consent even treating the President's proclamation as the date of the amendment because I think the inference at that time under the old Chisholm case making the Eleventh Amendment necessary would pretty much tell the State that they were subject to jurisdiction of affairs concerning trade with the Indians.

And, incidentally, as my predecessor used an expression, he wouldn't pound the table, and I wouldn't pound the table about this Decision, either. I think it's a very murky area that probably is deserving of much greater study in depth than was afforded either in the presentation or determination of these motions.

In view of my Decision, it really isn't necessary to say much, if anything, about the other statutory alleged bases for a waiver. Section 1541 and Section 10, -- I think there was so much emphasis laid on them in the Briefs that I should comment even though briefly about them.

In Section 1541, the State of New York waives its immunity in an action brought by a person claiming an estate or interest in real property to compel the determination of any *claim adverse to that of the Plaintiff* which the Defendant makes or which the Defendant might make. The State maintains the waiver is inapplicable since the claim brought against it is not within the purview of the section. To my thinking, I think the State is clearly correct on the plain language of the statute. It doesn't appear, or it hasn't appeared to me in all the years that I have been connected with this case that the State makes a claim adverse to the Counties at all. I think they were as solid as a block of granite up to this motion. They both claimed that the State had a valid title and that the State had a valid conveyance from the Oneidas on a number of grounds.

Then the Counties concede, contrary to their position, that this Circuit in Oneida -vs- New York, 443 F.2d 415 (Second Cir., 1971) holds that Section 1541 "Did not constitute consent by the State of New York to be sued in Federal Courts", Counties' Memo Pages 18, 19. They adjure me to disregard Knight because Judge Friendly "noted in his Opinion that the parties had not argued the question: 'in their exceedingly unhelpful Briefs'." They further assert that, "Had he been afforded the benefit of a full adversarial presentation of the issue, it's quite likely he would have reached the opposite result". Counties' Memo Page 19. I can't agree with either conclusion. Judge Friendly pointed out that the parties had omitted from their "exceedingly unhelpful Briefs" a stronger basis than that presented for excluding the action from the reach of the Eleventh Amendment so he immediately set himself up as sort of counsel; he presented the argument. Then he set himself up as a Judge and considered the argument and said that it wouldn't hold.

Now, I think the Counties know that I can't and wouldn't disregard Knight as cavalierly as they indicate I should. A Decision of the Court of Appeals in this Circuit is not persuasive to the District Court; it is binding on it. Hurley -vs- Hurley, 40 N.Y. 2d 78, (1980), does not alter the situation, either. Hurley merely held that the part of the Complaint within Article XV could be maintained in the New York Supreme Court but that the counts seeking damages would have to be relegated to the Court of Claims. I read Hurley a couple of times and nowhere in Hurley do I, can I find that Section 1541 constitutes a waiver of the bar of the Eleventh Amendment to a suit in the Federal Court.

Counsel also rely on Section 1362. I agree with Judge McCurn that 1362, 28 U.S.C. 1362, would form the basis for jurisdiction in an action under that section, but I don't have to rely nor do I rely on that section as the basis of this Decision.

Section 10 of the New York State Law can be disposed of almost summarily. It is without any judicial gloss. Apparently there have been no cases in the Court, at least no reported

cases. From the plain language of the section it seems that the Legislature meant to apply it to actions brought, as one of the conditions, brought for the recovery of land.

Now, the Plaintiffs in this case very pointedly throughout the litigation made it clear that they were not seeking the recovery of land. In one of my earlier Decisions, I distinctly remember crediting the Oneidas and praising them for the, I would say, delicate manner in which they sought to have this question determined with as little disruption as possible. Subsequent cases, when the silk glove didn't work and mailed fists become the mode of the day, sought less peaceable ways of resolving Indian land conflicts. I think the very fact that this was not an action for the recovery of land, certainly in the absence of any judicial gloss on Section 10, excluded it from the coverage of that section. The Legislature could certainly be sustained in their judgment if they sought to cover a situation where the disruptions attendant to an action to recover land was brought and not one which they could reasonably regard as less disrupting where damages only are sought so that -- then go one step further. It's hard for me to conceive that even assuming arguendo as the Counties do that Section 10 constitutes a waiver of the State's immunity to sue, it still falls far short of a waiver of the Eleventh Amendment to suits in the Federal Courts. This is one of the rare times when I think that I have taken longer to state my so-called brief reasons on the record than counsel have taken in presenting their arguments. That in no way reflects on the sufficiency of the arguments because as I indicated earlier the Briefs presented everything that certainly was necessary; that certainly was helpful to the Court.

I thank counsel for their Briefs.

Now, there is one thing accordingly as I indicated, I find that the motion of the State to dismiss should be denied. The motion of the Counties is granted.

Judgment should be entered in favor of the Counties and against the State.

Off the record.

(Discussion off the record.)

THE COURT: I direct, if it meets with everyone's satisfaction, I think that this is probably the best way to do it -- to resolve the question of the entry of Judgment in accordance with the Decision -- if I direct in my Order granting the Third-Party claims Summary Judgment in favor of the Counties and denying the motion of the State that I direct that the attorney for the Counties prepare and present to Mr. Jochnowitz a Proposed Judgment. If you are unable to agree on the form of a Judgment, then present it to the Court within fifteen days; that Judgment can be settled on three days' notice, or if you need longer, five days' notice.

(CONCLUSION OF PROCEEDINGS.)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

The ONEIDA INDIAN NATION OF NEW YORK STATE, et al.,	•	
Plaintiffs,	•	
v.	•	No. 70-CV-35
The COUNTY OF ONEIDA, New York, and the County of Madison, New York,	•	
Defendants and	•	
Third-Party	•	
Plaintiffs	•	
v.	•	
THE STATE OF NEW YORK,	•	
Third-Party Defendant.	•	

ORDER [OF MAY 5, 1982]

EDMUND PORT, Judge

The State of New York third-party defendant having moved to dismiss the third-party complaints of the County of Oneida, New York and the County of Madison, New York, and the County of Oneida, New York, third-party plaintiff and the County of Madison, New York, third-party plaintiff each having moved for summary judgment in its respective favor against the third-party defendant State of New York; and the plaintiffs having moved for leave to appear and file a memorandum as amicus curiae in support of third-party plaintiffs' claim for indemnity and the Court having heard counsel for all parties and having dictated its decision on the record, upon all of the proceedings had herein, it is

ORDERED, that the motion of the State of New York, third-party defendant to dismiss third-party complaints against it be and the same hereby is denied and it is further

ORDERED, that the motion of the County of Oneida, New York, third-party plaintiff and the motion of the County of Madison, New York, third-party plaintiff for summary judgment in favor of each county against the State of New York, third-party defendant be and the same hereby are granted and it is further

ORDERED, pursuant to the consent of all parties that the plaintiffs be and they hereby are granted leave to appear as amicus curiae and it is further

ORDERED, that judgment in accordance herewith be agreed upon by the parties and filed with the Court within fifteen days from the date hereof or judgment may be settled upon five days notice. The attorney for the third-party plaintiffs is to draw a proposed judgment and submit it to the attorney for the third-party defendant for approval.

/s/ Edmund Port
Senior U.S. District Judge

Dated: May 5, 1982
Auburn, New York

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

The ONEIDA INDIAN NATION OF NEW YORK STATE, et al., Plaintiffs, v.	No. 70-CV-35
The COUNTY OF ONEIDA, New York, and the County of Madison, New York, Defendants and Third-Party Plaintiffs v.	
THE STATE OF NEW YORK, Third-Party Defendant.	

JUDGMENT ON THIRD-PARTY COMPLAINTS
[OF MAY 19, 1982]

A motion by the Counties of Madison and Oneida, New York, (the "Counties"), as third-party plaintiffs above-named, for summary judgment in their respective favor against the State of New York as third-party defendant on their third-party complaints, having been duly brought on to be heard, and the Court on May 5, 1982 having made an order pursuant

thereto granting the Counties' motion and directing that judgment be entered herein in their favor ordering that the State of New York indemnify the Counties for any sums for which they may be held liable to the plaintiffs, it is hereby

ORDERED, ADJUDGED and DECREED that the Counties of Madison and Oneida, New York, third-party plaintiffs herein, are awarded judgment upon their respective third-party complaints against the State of New York for any portion of the plaintiffs' recovery herein directed or awarded, including any interest thereon, that is paid by either or both of the said Counties, together with interest at the rate of 6% per annum from the date of any such payment.

/s/ Edmund Port
Senior U.S. District Judge

Dated: May 17, 1982
Auburn, New York

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF NEW YORK

THE ONEIDA INDIAN NATION OF NEW YORK STATE, et al.,
Plaintiffs,
-against-

NOTICE OF APPEAL
70-CV-35

THE COUNTY OF ONEIDA, NEW YORK and THE COUNTY OF MADISON, NEW YORK,
Defendants and
Third-Party Defendants,
-against-
THE STATE OF NEW YORK,
Third-Party Defendant.

NOTICE IS HEREBY GIVEN that the State of New York, third-party defendant in the above actions, appeals to the United States Court of Appeals for the Second Circuit from the final judgment entered in the Office of the Clerk of the Northern District on May 19, 1982 and from the final order in said matter dated on May 5, 1982, both entered in the above action.

Dated: May 21, 1982

ROBERT ABRAMS
Attorney General of the State
of New York
Attorney for Third-Party Defendant

By _____
JEREMIAH JOCHNOWITZ

TO: HON. J. R. SCULLY
Clerk
United States District Court
for the Northern District of New York
Federal Post Office Building
Utica, New York 13503

TO: GOODWIN, PROCTER & HOAR, ESQS.
Attorneys for Defendants and
Third-Party Plaintiffs
28 State Street
Boston, Massachusetts 02109

ARLINDA LOCKLEAR, ESQ.
Attorney for Plaintiffs
appearing as *amicus*
1712 N. Street, N.W.
Washington, D.C. 20036

United States District Court

Northern District of New York

THE ONEIDA INDIAN NATION OF NEW YORK, et al.,
Plaintiffs,

v. CIVIL ACTION NO. 70-CV-35

THE COUNTY OF ONEIDA, NEW YORK, et al.,
Defendants.

Notice of Appeal of the Counties of Madison and Oneida, New York.

Pursuant to Fed. R. App. P. Rules 3 and 4, notice is hereby given that the defendants, the Counties of Madison and Oneida, New York, hereby appeal to the United States Court of Appeals for the Second Circuit from all interlocutory judgments and orders adverse to the Counties heretofore entered herein, the final judgment of this Court, Port, J., having been entered on the 19th day of May, 1982.

Respectfully submitted,

Allan van Gestel
GOODWIN, PROCTER & HOAR,
28 State Street
Boston, Massachusetts 02109
(617) 523-5700

Dated: June 11, 1982.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 545, 546, 643—August Term, 1982

Argued: January 18, 1983 Decided: September 29, 1983

Docket Nos. 82-7436, 82-7486, 82-7526

[719 F.2d 525 (2d Cir. 1983)]

THE ONEIDA INDIAN NATION OF NEW YORK STATE, a/k/a THE ONEIDA INDIAN NATION OF NEW YORK, a/k/a THE ONEIDA INDIANS OF NEW YORK; THE ONEIDA INDIAN NATION OF WISCONSIN, a/k/a THE ONEIDA TRIBE OF INDIANS OF WISCONSIN, INC.; and THE ONEIDA OF THE THAMES BAND COUNCIL,

Plaintiffs-Appellants-Cross-Appellees,

—against—

THE COUNTY OF ONEIDA, NEW YORK and THE COUNTY OF MADISON, NEW YORK,

Defendants-Third Party Plaintiffs-Appellees-Cross-Appellants,

—against—

STATE OF NEW YORK,

Third Party Defendant-Appellant.

Before:

LUMBARD, MANSFIELD and MESKILL,
Circuit Judges.

Appeal from an order of the United States District for the Northern District of New York, Edmund Port, *J.*, holding the Counties of Oneida and Madison, New York liable to the Oneida Indian Nation under the Trade and Intercourse Act of 1793, awarding the Oneida Indian nation $16,694 against the two Counties, and finding that the State of New York must indemnify the Counties for all damages assessed against them.

Affirmed and remanded for a recalculation of damages.

Judge Meskill dissents in a separate opinion.

ARLINDA LOCKLEAR, ESQ., Washington, D.C. (Lawrence Aschenbrenner, Esq., Native American Rights Fund, Washington, D.C., Francis Skenandore, Esq., Oneida, Wisconsin, Norman Dorsen, Esq., New York, N.Y., of counsel), for Oneida Indian Nation of Wisconsin and Oneida of the Thames Band.

BERTRAM E. HIRSCH, ESQ., Floral Park, N.Y., for Oneida Indian Nation of New York.

JEREMIAH JOCHNOWITZ, Assistant Solicitor General, Albany, N.Y. (Robert Abrams,

Attorney General of the State of New York, Peter H. Schiff, Acting Attorney in Chief Appeals and Opinions, Albany, N.Y., of counsel), for State of New York.

ALLAN van GESTEL, ESQ., Boston, Massachusetts, (Jeffrey C. Bates, Esq., Laura L. Carroll, Esq., Goodwin, Procter & Hoar, Boston, Massachusetts, of counsel), for County of Oneida, New York, and County of Madison, New York.

ROBERT T. COULTER, ESQ., Washington, D.C. (Curtis G. Berkey, Esq., Steven M. Tullberg, Esq., Indian Law Resource Center, Washington D.C., of counsel), for Amicus Curiae The Houdenosaunee.

LUMBARD, *Circuit Judge*:

All three parties appeal from the judgment of the Northern District of New York, Edmund J. Port, *Judge*. The defendants, Counties of Oneida and Madison, New York, appeal from Judge Port's decision holding them liable for wrongful possession of plaintiffs' land. 434 F. Supp. 527 (N.D.N.Y. 1977). Plaintiffs Oneida Indian Nation of New York State, Oneida Indian Nation of Wisconsin, and Oneida of the Thames Band Council (collectively the "Oneidas"), as well as the Counties appeal from Judge Port's decision of October 5, 1981, on damages. Finally, third party defendant State of New York appeals from Judge Port's ruling of May 5, 1982, that it must indemnify the Counties for any damages

assessed. We affirm each of Judge Port's three rulings, but remand for further proceedings on the calculation of damages.

The three plaintiffs in this case are the descendants of the Oneida Indian Nation which inhabited central New York for many years until shortly after the Revolutionary War. The Oneidas were part of the Six Nations or Iroquois, the most powerful tribe in the Northeast.[1] Their land extended from the Pennsylvania border north to the St. Lawrence River, from the shores of Lake Ontario to the western foothills of the Adirondack Mountains.[2] During the Revolutionary War, the Oneidas were active allies of the colonists against the British. Their support prevented the Iroquois from taking a unified stand against the colonists—an important achievement for the confederated states.

After the War, the United States rewarded the Oneidas in the Treaty of Fort Stanwix, 7 Stat. 15 (October 22, 1784), by securing them "in the possession of the lands on which they are settled." Later, two additional treaties further secured the Oneidas in the possession of their land. *See* Treaty at Fort Harmar, 7 Stat. 33 (January 9, 1789); Treaty with Six Nations, 7 Stat. 44 (November 11, 1794). The settlers of the new nation, however, in their constant fever to expand soon invaded the Indians' territory. Thus, under increasing pressure from its white residents, the State of New York in 1788 purported to

1 The Iroquois were composed of six tribes: the Cayuga, Mohawk, Oneida, Onondaga, Seneca, and Tuscarora.

2 Earlier in their history, before the influx of settlers, the Iroquois' land "extended from the hills of New England to the Mississippi River and from upper Canada into North Carolina." F. Cohen, *Handbook of Federal Indian Law* 417 (University of New Mexico Press reprint of 1942 ed.) (*Federal Indian Law*).

purchase most of the Oneidas' land—nearly five million acres.[3] The Oneidas retained about 300,000 acres near Oneida Lake.

As the pressure of new settlements everywhere continued to increase, the Indians became restive. In recognition of the frequently inequitable land purchases and to prevent Indian retaliation, the newly created federal government took an active role in protecting and securing the Indians in the possession of their land. President Washington and his Secretary of War, Henry Knox, encouraged Congress to enact legislation which recognized "that the Indian tribes possess the right of the soil of all lands within their limits, respectively, and that they are not be divested thereof, but in consequence of fair and bonafide purchases, made under the authority, or with the express approbation, of the United States." *American State Papers*, I *Indian Affairs* 53 (1834). Accordingly, Congress passed the Trade and Intercourse Act of 1790, Ch. 33, 1 Stat. 137 (hereinafter "1790 Act") which provided:

> [t]hat no person shall be permitted to carry on any trade or intercourse with the Indian tribes, without a [federal] license . . . [and] [t]hat no sale of land made by Indians . . . shall be valid to any person or persons, or to any state . . . unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.

Id. at 137-38.[4]

3 Much of this land is presently the subject of another lawsuit, *see Oneida Indian Nation of New York v. New York*, No. 78-104 (N.D.N.Y. filed December 5, 1979).

4 Section four of the 1790 Act states in full:

> *And be it enacted and declared*, That no sale of lands made by any Indians, or any nation or tribe of Indians within the United States,

The 1790 Act, however, was primarily declarative. It provided few enforcement mechanisms for protecting federal or tribal interest. Because it did little to stem the increasing illegal occupation of Indian lands, Congress in 1793 enacted a second Trade and Intercourse Act that added criminal penalties for illegally occupying Indian lands and authorized the President to remove trespassers from the land. Trade and Intercourse Act of 1793, Ch. 19, § 8, 1 Stat. 329, 330-31 (hereinafter "1793 Act"). The 1793 Act also provided that "informants" could enforce the section imposing fines on violators and collect one-half of the fine assessed.

Despite these statutory prohibitions, the State of New York attempted in 1795 to obtain Indian lands without the requisite federal approval. Throughout the ensuing months, the federal authorities repeatedly urged New York State Governor Clinton and his successor Governor John Jay to seek and secure the appointment of federal commissioners before the State negotiated any purchase of Indian lands. *See* 434 F. Supp. at 534-35. Despite this, the State sought an agreement with the Oneidas during the summer of 1795, over the express remonstrance of the federal authorities. *See id.* at 534. These negotiations led to the sale on September 15, 1795, in Albany, in contravention of the 1793 Act, of approximately 100,000 acres of the Oneidas' reservation. As the district court noted, however, the circumstances surrounding the Oneidas' assent to the purchase were fraught with irregularities. *Id.* 535. First, the Oneidas virtually never signed treaties outside their aboriginal land, yet the treaty was

shall be valid to any person or persons, or to any state, whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.

signed in Albany outside their aboriginal land boundaries. Second, normally the Oneidas' treaties were agreed to by unanimous consensus of the tribe; here, however, powers of attorney were given to individuals, none of whom were chiefs, to negotiate the transaction. Third, the State purchased the land for approximately fifty cents per acre. Within two years, the State in turn sold much of the land to white settlers for about $3.53 per acre.

Social and economic forces, including poverty, famine, alcoholism, and pressures on the Oneidas to move West resulted in the alienation of virtually all of their remaining New York acreage. Between 1795 and 1846, twenty-five more treaties between the State and the Oneidas were consummated, enabling the State to divest the Oneidas of all but a few hundred acres. Only two of these treaties (concerning land not here in question) were made with federal supervision and approval.[5] Furthermore, the State passed a statute that divided up the tribal landholdings and gave individual Indians a right to sell.

New York's abuse of the Oneidas was not accomplished without protest. Shortly after the 1784, 1787, and 1788 land purchases, the Oneidas contacted the federal government in protest over what they perceived as improper, deceitful, and overreaching conduct by the State. *See American State Papers*, I *Indian Affairs* 139 (1834). Their protest continued, especially between 1840 and 1875, and between 1909 and 1965. *See* 434 F. Supp. at 536.

Finally, in 1970 the Oneidas brought suit in the Northern District of New York claiming that the 1795

5 It has been estimated that the "State of New York acquired from the Indians all the western one-half of that state by nearly 200 treaties not participated in by the United States Government." *Federal Indian Law* at 420 n.24.

cession of land violated the Nonintercourse Act, and that the land was unconscionably purchased for an inadequate price. The complaint sought damages for the fair rental value of 871.92 acres which were part of the 1795 land transfer, for the period from January 1, 1968 to December 31, 1969. The district court on November 4, 1971, dismissed the complaint ruling that it asserted only a state law claim. Our affirmance over one judge's dissent, 464 F.2d 916, 918 (2d Cir. 1972), was unanimously reversed by the Supreme Court which held:

> Tribal rights [are] entitled to the protection of federal law, and with respect to Indian title based on aboriginal possession, the 'power of Congress . . . is supreme.'
>
> * * *
>
> The rudimentary propositions that Indian title is a matter of federal law and can be extinguished only with federal consent apply in all of the States, including the original 13.

414 U.S. 661, 669-70 (1974) (footnotes and citation omitted).

On remand, Judge Port trifurcated the proceedings, dividing the case into separate trials on the issues of liability, damages, and indemnity. First, Judge Port held that the State's 1795 purchase violated the 1793 Act. He later assessed the Counties $16,694 in damages plus interest. In addition, Judge Port over the State's principal objection on eleventh amendment grounds held that the State must indemnify the Counties for all damages assessed.

I.

LIABILITY

Plaintiffs claim two bases for a finding of liability in this case: federal common law and the 1793 Nonintercourse Act.[6]

(A) *Federal commmon law.*

The Counties assert that the Oneidas had no federal common law rights at the time of the 1795 purchase, and alternatively that whatever common law action there may have been was preempted by the Trade and Intercourse Act. We reject both contentions.

The interrelationship of the Indian nations and the United States—including its constituent states—early in the new nation's history was recognized as involving uniquely federal interests. The Constitution reflected this concern by delegating to the federal government the authority to "regulate Commerce with Foreign Nations, and among the several states, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. This federal interest in regulating Indian affairs was enunciated not only in treaties, *see, e.g., Treaty of Fort Stanwix, supra*, and statutes, *see, e.g.*, Trade and Intercourse Act of 1790, *supra*, but also in the recognition by the courts of the availability of a federal common law action to vindicate Indian land claims. The Supreme Court referred to this proposition in *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823), one of its earliest cases involving the transfer of Indian land. Although the case involved a title dispute

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6 Judge Port found a violation of the Trade and Intercourse Act of 1793. In formulating a remedy, however, he looked to the common law.

between non-Indians, the Court subsequently interpreted the case to stand for the general principle "that an action in ejectment could be maintained on an Indian right to occupancy and use . . . . This is the result of the decision in *Johnson v. M'Intosh*." *Marsh v. Brooks*, 49 U.S. (8 How.) 223, 232 (1850). Furthermore, the Court repeatedly has emphasized that this Indian right to occupancy and use is a federal right. *See, e.g., Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667, 670 (1974) (it is a "rudimentary proposition" that after the Constitution was "adopted, these tribal rights to Indian lands became the exclusive province of the federal law."); *see also Mohegan Tribe v. Connecticut*, 638 F.2d 612, 626 (2d Cir.), *cert. denied*, 452 U.S. 968 (1981) ("the extinguishment of all Indian title was meant to be a matter of federal concern"). In the prior appeal in this case, the Supreme Court alluded to the existence of a common law action on several occasions in mandating the exercise of federal jurisdiction. "[A] tribal right of occupancy, to be protected, need not be 'based upon a treaty, statute, or other formal government action.' . . . nevertheless [it is] entitled to the protection of federal law . . . ." *Oneida Indian Nation*, 414 U.S. at 669, quoting *U.S. v. Santa Fe Pacific R.R. Co.*, 314 U.S. 339, 347 (1941). "Absent federal statutory guidance, the governing rule of decision would be fashioned by the federal court in the mode of the common law." *Id.* at 674. We conclude that the Oneidas may assert a federal common law action to recover damages for the Counties' wrongful possession of their land.

The Counties, however, argue that this federal common law action was preempted by the enactment of the Trade and Intercourse Act. They cite *Milwaukee v. Illinois*, 451 U.S. 304 (1981), in which the Supreme Court held that a

subsequently enacted federal statute preempted the federal common law cause of action it previously had upheld in *Illinois v. Milwaukee*, 406 U.S. 91 (1972). In *Illinois v. Milwaukee* the Supreme Court recognized the existence of a federal common law action for abatement of a public nuisance in polluted interstate waters. Nine years later, however, the Court found in *Milwaukee v. Illinois* that such an action could no longer be maintained. In the intervening years, Congress had passed the Federal Water Pollution Control Act Amendments of 1972, Pub. L. 92-500, 86 Stat. 816 (hereinafter "FWPCA"). Under these lengthy amendments and their appurtenant regulations, it is illegal for anyone to discharge pollutants into American waters without a permit. 33 U.S.C. §§ 1311, 1342. (1976 ed. & Supp. III). Moreover, the discharge permitted is restricted to effluent limitations established by Environmental Protection Agency regulations. The statute provided for dual enforcement both by the federal government and by citizen suits. *See id.* §§ 1319 & 1365. It specifies the relief that may be obtained, the ranges of monetary penalties for various violations, and authorizes imprisonment in certain cases. *Id.* § 1319(c). Other aspects of the statute include grants for research, water treatment works, and water pollution standards. *See generally id.* §§ 1251 et seq. Under these circumstances the Court concluded that "Congress ha[d] not left the formulation of appropriate [pollution] standards to the courts . . . but rather ha[d] occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency." *Milwaukee v. Illinois*, 451 U.S. at 317. Thus, when Congress "speaks directly to a question," *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978), that originally "rested on federal common law, the need for such an

unusual exercise of lawmaking by federal courts disappears." *Milwaukee v. Illinois*, 451 U.S. at 314.

This case is quite different. The Trade and Intercourse Acts were not comprehensive statutes. They did not speak directly to the question of the Indians' ability to enforce their possessory rights by an action in ejectment. Rather, the Acts augmented the protection of Indian property rights previously afforded by federal common law by adding an additional statutory prohibition. This statute, *inter alia*, voided all land transactions in which Indians were a party that were consummated without federal approval. Furthermore, the 1793 Act both authorized the intervention of the President and the federal government on behalf of the Indians, and established criminal penalties for violations of the Act.[7] None of these statutory provisions expressly subsumed the common law modes of relief. There is no evidence to suggest that Congress intended to deny common law remedies to the Indians. In an analogous area involving congressional extinguishment

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7 Section eight states in full:

> *And be it further enacted*, That no purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made bya treaty or convention entered into pursuant to the constitution; and it shall be a misdemeanor, in any person not employed under the authority of the United States, in negotiating such treaty or convention, punishable by fine not exceeding one thousand dollars and imprisonment not exceeding twelve months, directly or indirectly to treat with any such Indians, nation or tribe of Indians, for the title or purchase of any lands by them held, or claimed: *Provided nevertheless*, That it shall be lawful for the agent or agents of any state, who may be present at any treaty, held with Indians under the authority of the United States, in the presence, and with the approbation of the commissioner or commissioners of the United States, appointed to hold the same, to propose to, and adjust with the Indians, the compensation to be made for their claims to lands within such state, which shall be extinguished by the treaty.

of Indian land titles, the Supreme Court has stated that evidence of such congressional intent should be "plain and unambiguous," and would "not be lightly implied in view of the avowed solicitude of the Federal Government for the Welfare of its Indian wards." *U.S. v. Santa Fe Pacific*, 314 U.S. at 346, 354. Neither should we imply a congressional intention to extinguish the Indians' common law remedy for vindicating their property rights in the absence of plain and unambiguous evidence of such a desire. Accordingly, we hold that the district court had jurisdiction to grant relief under federal common law.

(B) *Trade and Intercourse Act.*

Judge Port premised liability in large part on the State's violation of the 1793 Trade and Intercourse Act. On appeal, the State apparently does not question Judge Port's holding that the Act was violated. The 1793 Act explicitly required federal approval of a land purchase such as the 1795 cession. No such federal approval was obtained. The Counties, on the other hand, proffer five arguments in seeking to avoid liability: first, that the Trade and Intercourse Acts did not provide for a private suit for the enforcement of their provisions; second, that if such a suit could be maintained it abated upon expiration of the 1793 Act; third, that the Oneidas' claims are barred by the statute of limitations; fourth, that the claims are non-justiciable, and fifth, that the federal government subsequently ratified the 1795 transaction.

Implied Cause of Action.

It is beyond dispute that the Nonintercourse Acts were enacted for the protection of Indian tribes as beneficiaries. However, "the focus of [our] inquiry is on

whether Congress intended to create a remedy," *California v. Sierra Club,* 451 U.S. 287, 297 (1981). In resolving that question the Supreme Court has recently given us guidance:

> Our approach to the task of determining whether Congress intended to authorize a private cause of action has changed significantly, much as the quality and quantity of federal legislation has undergone significant change. When federal statutes were less comprehensive, the Court applied a relatively simple test to determine the availability of an implied private remedy. If a statute was enacted for the benefit of a special class, the judiciary normally recognized a remedy for members of that class. *Texas & Pacific R. Co. v. Rigsby,* 241 U.S. 33 (1916). Under this approach, federal courts, following a common-law tradition, regarded the denial of a remedy as the exception rather than the rule.
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> In view of the absence of any dispute about the proposition prior to the decision of *Cort v. Ash* in 1975, it is abundantly clear that an implied cause of action under the CEA was a part of the 'contemporary legal context' in which Congress legislated in 1974. *Cf. Cannon v. University of Chicago,* 441 U.S., at 698-699.

Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353, 374-75, 381 (1982).

When, prior to *Cort v. Ash,* 422 U.S. 66 (1975), an implied private remedy was part of the "contemporary legal context" in which Congress legislated, Congress will be deemed to have intended to preserve the remedy. *Id.,*

379-80; *Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723, 730 (1975).

Application of these basic principles leads us to the conclusion that in enacting the Nonintercourse Acts Congress must have expected that they would be enforced by private actions since they were clearly intended for the benefit of the Indian tribes. The federal statutory structure was extremely simple and had not even approached the complexity which led to the adoption of the *Cort v. Ash* requirements. Indeed, the right to enforce the Acts through private actions has been assumed by various lower federal courts. *See, e.g., Mashpee Tribe v. New Seabury Corp.,* 427 F. Supp. 899, 903 (D. Mass. 1977); *Schaghticoke Tribe of Indians v. Kent School Corp.,* 423 F. Supp. 780, 784 (D. Conn. 1976); *Narragansett Tribe of Indians v. Southern Rhode Island Land Development Corp.,* 418 F. Supp. 798, 805 & n.3 (D.R.I. 1976). Private enforcement has also been favored because of the federal government's poor performance of its statutory obligation to protect the Indians.[8] The congressional directives embodied in the Nonintercourse Acts frequently have been disregarded by the executive branch. *See, e.g., Narragansett Tribe,* 418 F. Supp. at 806 & n.4. Thus, by necessity, Indian tribes have been permitted to enforce the

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8 *See, e.g., United States v. Ahtanum Irrigation District,* 236 F.2d 321 (9th Cir. 1956), *cert. denied* 352 U.S. 988 (1957):

> The numerous sanctimonious expressions to be found in the acts of Congress, the statements of public officials, and the opinions of courts respecting "the generous and protective spirit which the United States properly feels towards its Indian wards," *Oklahoma Tax Comm. v. United States,* 319 U.S. 598, 607, 63 S. Ct. 1284, 1288 87 L.Ed. 1612, and the " 'high standards for fair dealing' required of the United States in controlling Indian affairs," *United States v. Alcea Band of Tillamooks,* 329 U.S. 40, 47 67 S. Ct. 167, 170, 91 L.Ed. 29 are but demonstrations of a gross national hypocrisy.

Acts. In any event we believe that under conventional *Cort v. Ash* analysis, the Indians have an implied private cause of action to enforce the Nonintercourse Acts' proscriptions.

Cort v. Ash, 422 U.S. 66 (1975), outlines four factors to be used in determining whether Congress has intended that individuals may bring private suits to enforce a particular statute:

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted,"—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a rememdy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Id. at 78 (citations omitted) (emphasis in original). We consider these four factors in that order.

(1) *Beneficiaries.*

The language and purpose of the 1793 Act are unequivocal in their purpose to protect the Indians. Section 1 provides that "no person shall be permitted to carry on any trade or intercourse with the Indian Tribes without a [federally granted] license . . . ." 1 Stat. at 329. Violators of the Act "shall forfeit all the merchandise offered for sale to the Indians," and they also may be imprisoned, and fined up to $1,000. *Id.* §§ 3 & 5, at 329-30. Furthermore, "no purchase or grant of lands . . . from any

Indians [without federal approval] shall be of any validity . . . ." *Id.* at § 8, at 330-31. The statute's purpose was "to prevent unfair, improvident or improper disposition by Indians of land owned or possessed by them to other parties . . . ." *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 119 (1960); *see also Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 664 (1979) ("a major purpose of these acts as they developed was to protect the rights of Indians to their property").

(2) *Legislative Intent.*

The legislative history of the Nonintercourse Acts, which is sparse and incomplete, furnishes no clear expression on the question of whether Congress intended to create a private right of action for damages. Congressional committee reports generally are unavailable, and floor debates were seldom recorded. The absence of legislative history is neither unusual nor fatal. "The legislative history of a statute that does not expressly create or deny a private remedy will typically be equally silent or ambiguous on the question." *Cannon v. University of Chicago*, 441 U.S. 677, 694 (1979). Nonetheless, "the failure of Congress expressly to consider a private remedy is not inevitably inconsistent with an intent on its part to make such a remedy available." *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 18 (1979). "[C]ongressional intent can be inferred from the language of the statute, the statutory structure," *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 94 (1981), "or in the circumstances of [the statute's] enactment." *Transamerica*, 444 U.S. at 18. *See also Cannon v. University of Chicago*, 441 U.S. at 698-99; *California v. Sierra Club*, 451 U.S. 287, 296 n.7 (1981).

The circumstances surrounding the enactment of the 1793 statute show that Congress intended to provide maximum protection of Indian land—and that this protection included the power to commence a private action.[9] The earlier 1790 Act in large part was due to the efforts of President George Washington and his Secretary of War, Henry Knox. Both men were "of high integrity and had extensive experience in Indian affairs." F. Prucha, *American Indian Policy in the Formative Years*: The Indian Trade and Intercourse Acts of 1790-1834 at 43-44 (1962) (hereinafter "*American Indian Policy*"). President Washington personally appeared before Congress and warned that legislation was needed to bolster the faltering relations with Indian Tribes. *See Sen-Exec. Journal*, 1st. Cong., 1st Sess. 20-24 (1789); I *Annals of Congress* 933 (1790).[10] Secretary Knox urged that if it were "declared by law . . . that the Indians possess the right to all their territory which they have not fairly conveyed, and that they should not be divested . . . [except by] treaties made under the authority of the United States, the foundation

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9 We reject the State's initial contention that Indian tribes lacked capacity to sue in federal court, and thus Congress could not have intended to create a private cause of action on their behalf. Although suits by tribes may have been rare the reasons for this were cultural, not legal:

> Except for the Cherokee, who had experienced some intermarriage and infusion of Anglo-American legal concepts, the tribes were ignorant of American legal processes and were still politically organized in traditional fashions, making resort to American courts virtually impossible.

Clinton & Hotopp, *Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims*, 31 Me. L. Rev. 17, 46 (1979).

10 As Secretary Knox said in a letter to North Carolina Governor Blount, quoted in *American Indian Policy* at 41: "The Indians have constantly had their jealousies and hatreds excited by the attempts to obtain their land."

of justice and peace would be laid." *American State Papers*, I *Indian Affairs* 53 (1834). The 1790 Act which followed embodied these "principles of justice and moderation, as [would] enforce the approbation of the dispassionate and enlightened part of mankind . . . [and it represented a policy of] conciliation of the Indians by negotiation . . . liberality, express guarantees of protection . . . and developed trade." *Id.* at 41, 44.

Section 4 of the 1790 Act stated that "no sale of lands made by any Indians . . . shall be valid . . . unless the same shall be made . . . under the authority of the United States." 1 Stat. at 138. Section 4's prohibition against non-federally approved Indian land sales did not carry with it any substantive penalties for its violation,[11] nor were there any mechanisms for enforcing its prohibition. Nonetheless, Congress must have intended that section 4 would be enforced by some party or institution. *See Transamerica*, 444 U.S. at 18-19. In *Transamerica*, the Supreme Court construed a securities' statute that was constructed similarly to the 1790 Act. Section 215 of the Investment Advisors Act of 1940 states that all waivers of compliance and "[e]very contract made in violation of any provision of this subchapter . . . shall be void. . . ." 15 U.S.C. § 80b-15. Like section 4 of the 1790 Act, 80b-15 simply declared that certain transactions were void. It did not explicitly provide for enforcement. Under these circumstances, the Supreme Court found that Congress intended a private right of action to enforce section 80b-15.

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11 Sections 2 and 3 which dealt with licensed traders, on the other hand, expressly included enforcement by the United States and perhaps by "informants" suits. *See* 1 Stat. at 138-39.

> By declaring certain contracts void, [section 80b-15] by its terms necessarily contemplates that the issue of voidness under its criteria may be litigated somewhere. At the very least Congress must have assumed that [section 80b-15] could be raised defensively in private litigation to preclude the enforcement of an investment advisors contract. But the legal consequences of voidness are typically not so limited. A person with the power to avoid a contract ordinarily may resort to a court to have the contract rescinded and to obtain restitution of consideration paid.
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> For these reasons we conclude that when Congress declared in [section 80b-15] that certain contracts were void, it intended that the customary legal incidents of voidness would follow.

Transamerica, 444 U.S. at 18, 19.

By analogy, if the State violated the 1790 Act, logically the Indians would have had "the customary legal incident" of a private right of action to enforce its strictures. With no express enforcement provisions accompanying section 4, a statutory interpretation that did not permit a private right of action would render section 4 unenforceable.

As the 1790 Act was set to expire in 1793, Congress passed the Trade and Intercourse Act of 1793 in which section 8 incorporated the original language of the 1790 Act which had voided all Indian land transactions negotiated without federal approval. In addition, it provided that violation of the section was a misdemeanor punishable by a fine and imprisonment.[12] The statute also

12 Violation of the 1793 Act was punishable by a fine up to $1,000 and imprisonment not to exceed twelve months. 1793 Act § 8, 1 Stat. at 330.

authorized the executive branch, at the discretion of the President, to remove violators from Indian land. Other sections regulating trade with the Indians also were added to the Act, with penalties for their violation.[13]

These upgraded remedies were designed to correct the perceived shortcomings of the 1790 statute. The 1790 Act had failed to protect the Indians adequately from predatory encroachment, trade, and land purchases. President Washington had urged Congress in his 1791 annual address to enact an "efficacious provision . . . inflicting adequate penalties upon all those who, by violating [the Indians'] rights, shall infringe the treaties and endanger the peace of the Union." 'Third Annual Address, President George Washington,' 1 *Messages and Papers of the President*, 105 (Richardson, ed., 1896). He renewed his plea in late 1792 stating, "I cannot dismiss the subject of Indian affairs without again recommending to your consideration the expediency of more adequate provision for giving energy to the laws throughout our interior frontier

13 The significant additions to the Trade and Intercourse Act included: Section one prohibited trade with Indians without a federally granted license. To obtain such a license, a licensee had to submit a $1,000 bond. Section two permitted the recall of the license, as well as recourse to the bond for any breaches of conditions placed on the licensee. The third section penalized unlicensed trading with Indians by imposing forfeiture of the merchandise traded, and a fine and imprisonment up to $100 and 30 days respectively. Crimes committed against Indians on Indian land were to be treated as if committed on non-Indian land under section 4. Section 5 proscribed settlement on Indian land with an attendant fine between $100 and $1,000 and imprisonment not to exceed twelve months for any violations of the section. The President was also authorized to remove unlawful settlors. Section 6 required a special license "to purchase any horse of an Indian, or of any white man in the Indian territory," and provided that persons purchasing horses without such a special license would forfeit both the horse and a sum not more than one hundred dollars, nor less than thirty dollars. One half of the forfeiture would be distributed to the prosecuting "informant" and one-half would go to the federal government.

. . . ." Speech of President George Washington, 2d Cong., 2d Sess., November 6, 1792, 1 *American State Papers*: *Indian Affairs*, at 119. In response, Congress enacted the more stringent 1793 statute, to increase the law's effectiveness through additional enforcement mechanisms. There is no suggestion that Congress intended to subtract from the statutes' remedies. Accordingly, we agree with the district court that the private right of action that existed under the 1790 Act remained intact in the 1793 Act.

Our conclusion that Congress intended that private parties would have a cause of action to enforce the 1793 Act is further supported by other evidence of congressional intent. For example, in 1822 Congress amended the Trade and Intercourse Act of 1802—which essentially continued the 1793 Act's land alienation provision—to place the burden of proof on white persons in all cases in which Indians were parties. 3 Stat. 683 (1822). This pertained to "all trials about the right of property in which Indians shall be party on one side, and white persons on the other." *Id.* This provision only makes sense if Congress had intended the Trade and Intercourse Acts to authorize Indians to appear as plaintiffs to enforce the Acts, as well as to be defendants.

Furthermore, the 1793 Act's misdemeanor provison only appears to apply to "negotiators" of Indian land cession transactions. The State, rather than Counties, thus would appear to be subject to the criminal penalties of the statute. *Cf. Rewis v. United States*, 401 U.S. 808, 812 (1971) ("ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity."). Without the availability of a private right of action against the Counties the only remedy would be the executive's discre-

tionary removal of violators.[14] Presidential authority to remove intruders even when exercised, however, often proved ineffectual. *American Indian Policy* at 158-66. Thus, absent a right of action, the Oneidas would have a right under a statute that was unenforceable. For all these reasons, we conclude that Congress intended that Indian litigants could bring private suits to enforce the 1793 Act's prohibition of certain land cessions.[15]

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14 *Cf. Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 374 (1968):

> [T]he general power of the United States to safeguard an allotment affected the capacity of the Indian to protect that allotment. Furthermore, the Bureau of Indian Affairs, which is the agency of the Department of the Interior charged with fulfilling the trust obligations of the United States, is faced "with an almost staggering problem in attempting to discharge its trust obligations with respect to thousands upon thousands of scattered Indian allotments. In some cases, the adequate fulfillment of trust responsibilities on these allotments would undoubtedly involve administrative costs running many times the income value of the property." H.R. Rep. No. 2503, 82d Cong., 2d Sess., 23 (1952). Recognizing these administrative burdens and realizing that Indian's right to sue should not depend on the good judgment or zeal of a government attorney, the United States has indicated its support of petitioners' position that Indians have a capacity to sue under the oil and gas lease.

(footnote omitted).

15 The only remnants of legislative history available indicate that President Washington, who was the moving force behind the 1790 and 1793 Acts, thought that they permitted the Indians to bring private causes of action. Cornplanter, Chief of the Seneca Indians, another tribe of the Six Nations, had met with President Washington in December 1790 to present their complaints about certain land transactions entered into during the prior decade. *American State Papers*, I *Indian Affairs* 139 (1834). Washington assured Cornplanter that at least after 1790, "the case [was] entirely altered; . . . any treaty formed and held without [the federal government's] authority [was] not binding." *Id.* Moreover, "[i]f . . . you have any just cause of complaint against and can make satisfactory proof thereof, the federal courts will be open to you for redress, as to all other persons." *Id.* This speech was printed and communicated to Congress on January 11, 1792. *Id.* 142-43. Congress, therefore, was made aware of President Washington's perception of the reach of Indian law.

(3) *Statutory Purpose.*

The purposes of the 1793 Trade and Intercourse Act are best served by the implication of a private right of action. "[A] major purpose of the Acts as they developed was to protect the rights of Indians to their properties." *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 664 (1979). *See also U.S. v. Southern Pacific Transportation Co.*, 543 F.2d 676, 697 (9th Cir. 1976) (the statute was meant to "prevent the steady diminution of Indian territory . . . unless . . . by public treaty."). The Supreme Court has stated that it is "decidedly receptive" to the implication of a "private remedy [that] is necessary or at least helpful to the accomplishment of the statutory purpose . . . ." *Cannon v. University of Chicago*, 441 U.S. at 703. A private right of action is necessary in view of the virtually complete failure of other statutory remedies to provide the Indians with any real protection. *See United States v. Ahtanum Irrigation District*, 236 F.2d 321 (9th Cir. 1956), *cert. denied*, 352 U.S. 988 (1957); *American Indian Policy* at 147, 158-66.

(4) *Federal or State Concern.*

As stated above the Indians have a federal common law possessory cause of action. Moreover, it is well settled that laws affecting the Indians are principally the province of federal, not state law. *See, e.g., Oneida Indian Nation*, 414 U.S. at 669; *Hughes v. Washington*, 389 U.S. 290, 292-93 (1967); *Board of Commissioners v. United States*, 308 U.S. 343, 350-51 (1939); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

Thus, all four prongs of the *Cort v. Ash* test have been met. Accordingly, we hold that the Oneidas had a private

right of action to enforce the Trade and Intercourse Act of 1793. We now turn to defendant's other arguments.

Abatement of the Cause of Action.

The Counties argue that even if the Oneidas could have brought suit under the 1793 Act, that cause of action has since abated. The 1793 Act expired after "two years, and from thence to the end of the then next session of Congress . . ." 1 Stat. at 332. Appellants assert, quoting *The General Pinkney*, 9 U.S. 5 (Cranch) 281, 283 (1809), that after the termination of the 1793 Act, "no penalty can be enforced, nor punishment inflicted, for violations of the law committed while it was in force unless some special provision be made for that purpose by statute." We disagree. The pertinent provision of the 1793 Act remains operative. 25 U.S.C. § 177 (1983) states that "[n]o purchase . . . of lands . . . from any Indian nation or tribe of Indians shall be of any validity . . . unless same be made by treaty . . . under the authority of the United States." Under these circumstances, "the better and prevailing rule is that so much of the original as is repeated in the later statute without substantial change is affirmed and continued in force without interruption." *Great Northern Ry. Co. v. United States*, 155 F. 945, 948 (8th Cir. 1907). Abatement is inapplicable according to this proposition because the underlying rationale of abatement is inapposite. Abatement "[i]mputes to Congress an intention to avoid inflicting punishment at a time when it would no longer further any legislative purpose. . . ." *Hamm v. City of Rock Hill*, 379 U.S. 306, 313 (1964). Because the 1793 statute remains essentially in force in 25 U.S.C. § 177, the continued invalidity of the illegal transactions would "further a legislative purpose," namely, protection of Indian land title.

Miscellaneous Objections to Liability.

Appellants raise three other arguments against liability: the statute of limitations, non-justiciability, and subsequent federal ratification of the 1795 transaction.

(1) *Statute of Limitations.*

Appellants claim that this suit, instituted 175 years after the cause of action accrued is time-barred. We disagree. State statutes of limitation are inapplicable. As we recently emphasized, in cases involving Indian land claims "[d]efenses based upon state adverse possession laws and state statutes of limitation have been consistently rejected." *Mohegan Tribe v. State of Connecticut*, 638 F.2d at 614-15 & n.3. Moreover, state statutes of limitation are not borrowed "if their application would be inconsistent with the underlying policies of the federal statute." *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 367 (1977). Applying New York's statute would permit a violation of the 1793 Act to go unremedied, and thus would be patently inconsistent with the Trade and Intercourse Acts. In addition, we have recently rejected the assertion that such actions are time-barred noting that "[i]t is clearly established that a suit by the United States as trustee on behalf of an Indian tribe is not subject to state delay-based defenses. It would be anomalous to allow the trustee to sue under more favorable conditions that those afforded the tribes themselves." *Oneida Indian Nation of New York v. New York*, 691 F.2d 1070, 1083-84 (2d Cir. 1982) (citation omitted).

Suits brought by the United States on behalf of Indian tribes are governed by the special statute of limitations set forth in 28 U.S.C. § 2415 which provides some guidance in the present situation. Under section 2415(c) there is no

time limitation if the action is to "establish the title to, or right of possession of, real or personal property." Section 2415(a) provides that actions in contract seeking money damages that accrued prior to July 1966 are timely if filed prior to December 31, 1982. Thus, had the United States brought the instant suit in 1970 instead of the Oneidas, it would not have been time-barred. We conclude that "at the very least, suits by tribes should be held timely if such suits would have been timely if brought by the United States." *Id.* at 1084

(2) *Justiciability.*

Appellants advance several reasons in support of their assertion that the Oneidas' claims present non-justiciable political questions:

(1) determination of the lawfulness of and remedy for the Counties' occupancy has been committed to the President;

(2) determination of the Plaintiffs' claim entails a choice among contenders for the right to govern the area covered by the 1795 conveyance;

(3) determination of the Plaintiffs' claim entails the allocation of tribal property, which is committed to Congress;

(4) determination of these questions by a federal court entails the risk of multifarious pronouncements on the foregoing questions by the different branches of the federal government.

Our holding that the Oneidas have a federal common law cause of action and an action to enforce the 1793 Trade and Intercourse Act negates defendants' argument

that the exclusive remedy against illegal occupiers is committed to the President. *Accord, e.g., Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976); *Oneida Indian Nation of New York v. County of Oneida*, 414 U.S. 661 (1974); *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975); *Fort Mojave Tribe v. Lafollette*, 478 F.2d 1016 (9th Cir. 1973); *Mashpee Tribe v. New Seabury Corp.*, 427 F. Supp. 899 (D. Mass, 1977); *Schaghticoke v. Kent School Corp.*, 423 F. Supp. 780 (D. Conn. 1976); *Narragansett Tribe v. Southern Rhode Island Land Development Corp.*, 418 F. Supp. 798 (D. R.I. 1976).

The Counties' next two propositions also must be rejected. They assert that the effect of the district court's decision is to transfer the sovereignty of over 100,000 acres of New York State land "to at least three tribal factions who are, and who have been for years, feuding over which is the proper government tribe." This, they assert, is an issue "on which the district court must defer 'to the political departments.'" *Id.*, quoting, *Baker v. Carr*, 369 U.S. 186, 215 (1962).

The district court found that the three plaintiffs were the direct descendants of the Oneida Indian Nation that inhabited the land in question in 1795. 434 F. Supp. at 532. Judge Port based this decision on expert testimony, implicit United States' verification stemming from annuity payments, and recognition by the Bureau of Indian Affairs. *Id.* at 532-33. Appellants have given us no reason to disturb this finding. Hence, there is no need to intrude on internal tribal governance; moreover, the appropriate allocation of damages amongst the plaintiffs is not a

question that is presently before us on appeal.[16] Furthermore, as we observed in *Oneida Indian Nation v. New York*, "[t]o our knowledge no Indian land claim has ever been dismissed on non-justiciability grounds." 691 F.2d at 1081.

Finally, the Counties assert that our holding will have catastrophic ramifications. We rejected this argument in *Oneida Indian Nation v. New York*, in which we stated "we know of no principle of law that would relate the availability of judicial relief inversely to the gravity of the wrong sought to be addressed." *Id.* at 1083; *see generally id.*

(3) *Subsequent Federal Ratification.*

The Counties assert as a third defense to liability that the United States subsequently ratified the 1795 transaction in two federally approved treaties between the Oneidas and the State. The Treaty of June 1, 1798, describes the 1795 transaction as a "purchase." It also provides in relevant part:

> The said [Oneida] Indians do cede, release, and quitclaim to the people of the State of New York, forever, all the lands within their reservation, to the westward and southwestward of a line from the northeastern corner of the lot No. 54, *in the last purchase from them* running northerly to a button wood tree, . . . standing on the bank of the Oneida lake[.]

Treaty of 1798 (emphasis added). The "last purchase" referred to in this treaty, the parties agree, was the 1795

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16 *See* 434 F. Supp. at 538 n.20 ("Since this phase of the trial is solely to determine liability, the rights of the individual plaintiffs to share in a recovery can be left for another day.").

transaction. The federally approved Treaty of June 4, 1802 also mentions lands "heretofore ceded . . . to the State of New York," ostensibly a reference to the 1795 purchase. In addition, both treaties refer to lots 54 and 59 which were part of the 1795 transaction.

We agree with the district court which cited *United States v. Santa Fe Pacific* in its holding that the reference in these treaties were not a "plain and unambiguous" ratification of the 1795 transaction. In *United States v. Santa Fe Pacific*, the Supreme Court refused to find that an ambiguous congressional pronouncement had acted to extinguish Indian land title. In so doing, the Court stated that " '[u]nquestionably it has been the policy of the federal government from the beginning to respect the Indian right of occupancy, which could only be interfered with or determined by the United States.' " 314 U.S. at 345, quoting *Cramer v. United States*, 261 U.S. 219, 227 (1923). Extinguishment of the Indians' title could not be "lightly implied" because "[c]ertainly, it would take plain and unambiguous action to deprive the Walapais [Indian tribe] of the benefits of that policy." *Id.* at 346, 354.

In arguing that the "plain and unambiguous" standard is inapplicable, the Counties attempt to distinguish the claimed ratification herein from the extinguishment of Indian title involved in *United States v. Santa Fe Pacific*. The distinction, however, is a meaningless one. Ratification also would serve to extinguish the Oneidas' title. We find the Counties' argument wanting for a second reason. Even under the standard propounded by the Counties it cannot be said that isolated references to land boundaries in the 1798 or 1802 treaties, which are little more than "metes and bounds" descriptions, are sufficient to constitute ratification of the 1795 transaction. Moreover, neither treaty makes any reference to the validity of the

underlying 1795 "purchase." There is no evidence that the federal authorities were then aware of any claim of illegality of the prior land sale.

II.

DAMAGES

After a separate trial on the issue of damages, Judge Port on October 5, 1981 awarded the Oneidas $9,060 plus interest against Madison County, and $7,634 plus interest against Oneida County for their unlawful use and occupation of the Oneidas' land for the years 1968 and 1969.[17] Judge Port arrived at these amounts by calculating the fair rental value of the land as unimproved for the years 1968 and 1969. Against those amounts he allowed the Counties a set-off for improvements because they occupied the land in good faith, and without knowledge of the unlawfulness of their continued occupation.

The appellants raise three issues regarding Judge Port's decision. The first is whether the Counties as allegedly good faith occupiers of the Oneidas' land can be held liable in damages. The second issue concerns the district court's ruling that the Counties could set-off against the damages assessed the amount of improvements they made on the land. And the third question is whether the law of eminent domain is relevant to the calculation of damages.

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17 As we noted earlier, *see supra* note 6, the district court found a violation of the 1793 Trade and Intercourse Act, but appeared to resort to the common law in formulating a damage remedy. We understand the district court to have examined the common law only to assist it in formulating a statutory damage remedy.

A. *Availability of a Damage Remedy.*

The Counties claim first that they did not violate the 1793 Trade and Intercourse Act, and second that if they did, the Act explicitly provides the exclusive remedies for its violation. They note that it was the state that violated the 1793 Act in 1795 and not the Counties,[18] which were subsequent occupiers of the land.[19] Even bad faith occupation would not violate the Act, the Counties assert, because section 8 regulates the disposition, not the occupation of Indian land. The Counties also contend that, in any event, they are good faith occupiers, and that the 1793 Act was not intended to assess damages against those holding land in good faith.

The Counties, however, do not question Judge Port's holding that the 1795 transfer of Indian land was void.[20] In effect the Counties have asked us to find that their good faith occupation of Oneida land can act as a subsequent validation of the 1795 transaction. To accept the Counties' argument, however, would render the Trade and Intercourse Acts wholly ineffective.[21]

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18 Oneida County was established in 1798 and Madison County in 1806. J. Lomenzo, *Manual for the Use of the Legislature of the State of New York* 310 (1938 ed.).

19 The district court was not able to ascertain when the Counties began their occupation of the Oneidas land, determining only that it was sometime in the 1800's.

20 Moreover, Judge Port's determination was amply supported. *See* 434 F. Supp. at 537-40

21 When Congress intended a provision in the same statute to contain an intent or good faith element it simply did so expressly. *See* § 6, 1 Stat. at 330 ("every person, who shall purchase a horse, knowing him to be brought out of Indian territory, by any person or persons not licensed, as above, to purchase the same shall forfeit the value of such horse.").

As we previously stated, the Oneidas are entitled to enforce the Nonintercourse Act's voiding of the 1795 purchase. This is what the Oneidas' lawsuit seeks to do. Their suit closely corresponds to the common law action for ejectment in which a plaintiff need only establish his right to possession. *See New York v. White*, 528 F.2d 336, 338 (2d Cir. 1975); *see also Taylor v. Anderson*, 234 U.S. 74 (1914). The Oneidas' claim is based on their present right of possession, *see Oneida Indian Nation*, 414 U.S. at 666, and the Counties' liability is premised on their continued occupancy of Oneida land in violation of the Act. Under the common law the good or bad faith of the occupant is irrelevant to his liability. *See, e.g., Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 80-81 (1823); *Miceli v. Riley*, 436 N.Y.S.2d 72, 74-75, 79 A.D.2d 165 (1981). The Counties' occupation, regardless of their good or bad faith, of Indian land obtained in a transaction that violated the 1793 Act renders them liable.

The Counties also contend, however, that if their possession does violate the Act, the only remedies for their violation are expressly set out in the statute. *See supra* note 10. It follows from our conclusion that the Oneidas have a private cause of action that Congress intended the concomitant damage remedy that flows with it to be available; it is a "customary legal incident" of the private action. *See Transamerica*, 444 U.S. at 19. The Counties' conclusory statement that the statute provides the exclusive remedies for its violation, without citation to any legislative history, ignores the Supreme Court's repeated admonitions: "The creation of one explicit mode of enforcement is not dispositive of congressional intent with respect ot other complementary remedies." *California v. Sierra Club*, 451 U.S. at 295 n.6, citing *Transamerica*, 444 U.S. at 29 n.6 (White, *J.*, dissenting); *Cort*

v. Ash, 422 U.S. at 82-83 n.14. Accordingly, we agree with Judge Port that the Counties are responsible for the continuing violation of the 1793 Act and are liable in damages for that violation.

B. *Improvements' Set-Off.*

Since the Counties assumed possession of the Oneidas' land they have erected or completed several improvements on the land. They asserted, and the district court held, that the Counties were entitled to a set-off of the value of these improvements against the Oneidas' fair rental value damages. The improvements on the 871.92 total acres were: 809 acres used as highways; the 47.22 acre Champlain Battleground Park; a 2.07 acre parcel used as a fire department radio tower and a 13.13 acre gravel bed. To arrive at the rental value less improvements the court simply calculated the fair rental value of the land as unimproved.

Neither party appears to question Judge Port's fair rental value method of calculating damages.[22] Thus, the only dispute is whether the district court could set-off the value of improvements against the fair rental value damages. The court applied the common law rule that a good-faith occupier of land is entitled to a set-off for improvements. *See Green v. Biddle*, 21 U.S. (8 Wheat.) at 59; *see also Miceli v. Riley*, 436 N.Y.S.2d at 74; *Berney v. Brodie*, 272 N.Y.S.2d 881, 26 A.D.2d 679 (1966); 42 C.J.S. Improvements § 7 at 432 (1944). The Oneidas argue first that the common law rule should not be applied because it would frustrate the purposes of the 1793 Act by rewarding trespassers and encouraging un-

22 *See Utah Power & Light Co. v. United States*, 243 U.S. 389, 411 (1917); *New Orleans v. Gaines*, 82 U.S. (15 Wall.) 624 (1872).

lawful alienations and occupations. We disagree. Presumably, the common law rule is based on the premise that to require forfeiture by the good-faith occupier of the value of its improvements would work an injustice and provide little in the way of added deterrence. A contrary rule would not discourage good faith trespassers from their illegal occupation because it is based on a mistaken, though still wrongful, belief of ownership. We are not prepared to require the good faith non-active wrongdoer, here a political subdivision, to forego the value of improvements it made in the absence of any policy benefits. If good faith occupiers were not credited with the value of their improvements, this would lead to the anomalous result that they usually would suffer higher damages than bad faith occupiers because good-faith occupants are more likely to make improvements.

The Oneidas next question the district court's finding that the Counties held the land in good faith. We find this issue more troublesome. The burden of proving good faith, rests on the Counties. *See, e.g., United States v. Wilson*, 523 F. Supp. 874, 900-901 (N.D. Iowa 1981); *Deakyne v. Lewes Anglers, Inc.*, 205 F. Supp. 415 (D. Del. 1962); *Church of God Prophecy v. Ferris*, 244 N.Y.S.2d 279, 281, 19 A.D.2d 934 (1963). The record does not show, however, whether the district judge placed the burden of proof on the Counties or on the Oneidas. Judge Port's opinion merely states that "there is no evidence to connect the defendants, these two Counties, with [the State's] act of bad faith; nor is there any other evidence indicating that they were bad-faith occupiers of the land in 1968 or 1969 . . . ." At trial, however, the Counties only profferred evidence that they had been acting in good faith since 1970. Inasmuch as the Counties had possession of the Oneidas' land since sometime in the

1800's, it is not enough that they established good faith since 1970. On the basis of the present record, however, we are not prepared to overturn Judge Port's determination that the Counties had acted in good faith. We leave clarification of the issue of good faith to the district court on remand.

C. *Computing Damages at 90% of the Fair Rental Value.*

The Oneidas' last argument is that the lower court erred in calculating at less than 100% of the fair rental value certain lands through which highways presently run. Judge Port stated in his opinion:

> That plaintiffs were entitled to possession the same as any landowner is before an eminent domain and he was deprived of that possession by the conduct of the defendant so that the damages sustained by both plaintiffs can be viewed as substantially the same and, generally speaking, the rules of eminent domain could be applied here and do justice to the parties.

Judge Port then analogized the Oneidas' claim to a request for "just compensation" for a road easement condemnation, and calculated the fair rental of 90% of the value of the property. We cannot agree that such a discount is appropriate. It treats the Counties' occupation as if it were a lawfully obtained easement. We see no reason why there should be any diminution of the damages even if the uses were for a public purpose. Accordingly, on remand the district court should calculate damages without any discount.

III.

INDEMNIFICATION

The Counties filed third-party complaints against the State seeking indemnification of any damages assessed against them for their possession of the Oneidas' land. The State moved to dismiss the complaints, and the Counties cross-moved for summary judgment. Judge Port granted the Counties' motion over the State's objections that the court lacked subject matter jurisdiction, that the complaint failed to state a cause of action, and that the State's eleventh amendment immunity to suit barred the action.

A. *Subject Matter Jurisdiction*

The State maintains that the district court erred in holding that it had ancillary jurisdiction over the indemnity action, contending that the indemnity suit does not arise out of the same core of operative facts as the Oneidas' claim against the Counties. Any indemnity liability, the State argues, would stem from the State's disposition of the land to the Counties, and not from its acquisition of the land in violation of the Trade and Intercourse Act. We disagree. In order to establish their right to indemnity the Counties must show that they are compelled to pay monetary damages as a result of the State's wrongful conduct—here, New York's violation of the 1793 Act. *See Great American Ins. Co. v. United States*, 575 F.2d 1031, 1035 (2d Cir. 1978); *Tokio Marine & Fire Ins. Co. v. McDonnell Douglas Corp.*, 465 F. Supp. 790 (S.D.N.Y. 1978); *Taft v. Shaffer Trucking, Inc.*, 383 N.Y.S.2d 744, 52 A.D.2d 255 (1976). The Counties' indemnity claim, therefore, is based largely on

the same facts that established the Counties' liability. The Oneidas alleged and proved that the State had violated the 1793 Trade and Intercourse Act. Plaintiffs established, moreover, that the Counties were wrongfully occupying this land that had devolved from the State to the Counties. These same facts also establish the legal and equitable basis for the Counties' indemnity action. *See supra* section (II) (A). When the action for indemnification arises out of the same core of facts, the court's jurisdiction is "ancillary to its jurisdiction over the main action," *United States v. Farr & Co.*, 342 F.2d 383, 384 n.1 (2d Cir. 1965), and no independent basis for jurisdiction is necessary. *See* Fed. R. Civ. P. 14(a); *Agrashell, Inc. v. Bernard Sirotta Co.* 344 F.2d 583, 585 (2d Cir. 1965; *Dery v. Wyer*, 265 F.2d 804, 807 (2d Cir. 1959); *Ayer v. General Dynamics Corp.*, 82 F.R.D. 115, 121 (S.D.N.Y. 1979); 3 J. Moore, Moore's Federal Practice § 14.26, at 14-108 & n.6 (1982).

B. *Failure to State a Cause of Action.*

We find no merit in the State's assertion that there is no cause of action for indemnity. "It is nothing short of simple fairness to recognize that '[a] person who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other, is entitled to indemnity.' Restatement, Restitution, § 76." *McDermott v. City of New York*, 50 N.Y.2d 211, 406 N.E.2d 260, 428 N.Y.S.2d 643, 646 (1980). Therefore, when "payment by one person is compelled, which another should have made . . . a contract to reimburse or indemnify is implied by law." *Brown v. Rosenbaum*, 287 N.Y. 510, 518-19, 41 N.E.2d 77 (1942); *see also Dunn v. Uvalde*

Asphalt Paving Co., 175 N.Y. 214, 217-18, 67 N.E. 439 (1903); *Oceanic S.N. Co. v. Compania Transatlantica Espanola*, 134 N.Y. 461, 465-68, 31 N.E. 987 (1892); *City of Brooklyn v. Brooklyn City R.R. Co.*, 47 N.Y. 475, 486-87 (1872); Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. of Pa. L. Rev. 130, 147 (1932); Meriam & Thornton, *Indemnity Between Tortfeasors: An Evolving Doctrine in the New York Court of Appeals*, 25 N.Y.U.L. Rev. 845 (1950).

C. *Eleventh Amendment Immunity.*

The State argues that the eleventh amendment is a bar to the Counties' claim against it. The amendment provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

We agree with the district court that the eleventh amendment is not a bar to action against the State of New York. The State's acquisition of the Oneidas' land was in subordination to the power of Congress to legislate regarding Indian lands, pursuant to Article 1, Section 8 of the Constitution.[23] The 1790 and 1793 Acts of Congress placed New York on notice that Congress had exercised its power to regulate commerce with the Indians.[24] Thus,

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23 "By empowering Congress to regulate commerce, then, the States necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation." *Parden*, 377 U.S. at 192.

24 Section 8 of the 1793 Act prohibited purchases of Indian lands not negotiated "under the authority of the United States." *See supra* note

anything New York thereafter did with respect to Indian lands carried with it a waiver of the State's eleventh amendment immunity. *See Edelman v. Jordan*, 415 U.S. 651, 672 (1974); *Employees v. Missouri Public Health & Welfare Dept.*, 411 U.S. 279, 283-84 (1973).[25]

In *Parden v. Terminal Ry. Co.*, 377 U.S. 184 (1964), the state of Alabama owned and operated a railroad in interstate commerce. Alabama had commenced its railroad operation twenty years after the enactment of the Federal Employers Liability Act, 45 U.S.C. §§ 51-60 ("FELA"). This Act permitted a railroad employee to sue his or her employer for personal injuries sustained in the course of employment. The Court found that Congress had conditioned operation of a railroad on acceptance of potential FELA liability and any damage suits arising therefrom; by starting the railroad after the FELA had been enacted, Alabama had constructively consented to a waiver of its immunity. 377 U.S. at 192; *see also County of Monroe v. State of Florida*, 678 F.2d 1124, 1133 (2d Cir. 1982), *cert. denied*, 103 S. Ct. 762 (1983). The importance of the chronology in *Parden* became readily apparent after the Supreme Court's subsequent decisions in *Edelman* and *Employees*. Unlike *Parden*, "[i]n neither of those cases did the state have sufficient notice that it would be liable for damages if it participated in the

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7. Similarly, section 4 of the 1790 Act stated "[t]hat no sale of lands made by Indians . . . shall be valid to any person or persons, or to any state . . . ."

25 The Supreme Court has not stated the necessity of proving state waiver of immunity in the fourteenth amendment context. *See, e.g., Fitzpatrick v. Bitzer*, 427 U.S. at 456. By ratifying the fourteenth amendment after the eleventh amendment, the states can be said to have waived their immunity in all cases in which Congress exercises its enforcement power under section 5 of the fourteenth amendment.

federal programs." *County of Monroe*, 678 F.2d at 1134. In *Employees*, Missouri had been operating hospitals long before the 1966 amendment extended the coverage of the FELA to state employees. In *Edelman*, similarly, Illinois was faced with a federal statute that appeared to impose only the sanction of future funding curtailment, and not a damage suit for benefits wrongfully withheld. Neither Illinois nor Missouri thus had "sufficient notice that it would be liable for damages if it participated in the federal programs." *Id.* As a result, neither state had a "real option to discontinue its participation in the activities subject to federal regulation and forego the accompanying benefits." *Ibid.* The choice between terminating "vital public services" and waiving eleventh amendment immunity was "no true choice at all." *Employees*, 411 U.S. at 296 (Marshall, *J.*, concurring).

The instant case is analogous to *Parden*. The 1793 Act was enacted two years prior to the state's purchase of Oneida land. Thus, the State had adequate notice that it was subject to the statute's strictures. *See generally supra*. As the district court noted, on several occasions President Washington and Secretary Knox urged New York to comply with the 1793 Act. *See* 434 F. Supp. at 534-35. The state chose to ignore their admonitions. The State's proprietary purchase of Indian land thus was an act wholly outside "the sphere that is exclusively its own and enter[ed the state] into activities subject to congressional regulation . . . ." *Parden*, 377 U.S. at 196. The State's act, "with its 'eyes wide open,' " *County of Monroe*, 678 F.2d at 1134, quoting *Edelman*, 415 U.S. at 693 (Marshall, *J.*, dissenting), "subjects itself to that regulation as fully as if it were a private person or corporation." *Parden*, 377 U.S. at 196. Therefore, we agree with the district court's determination that New York impliedly

consented to a waiver of its eleventh amendment immunity.

* * * * *

We affirm the judgment of the district court which held the Counties liable for illegal occupation of the Oneida land, and its judgment that the State of New York must indemnify the Counties for any damages assessed against them.

We remand for further proceedings to determine the good faith claims of the Counties as they bear on any set-off for improvements made on the property, and for recomputation of damages.

MESKILL, *Circuit Judge*, dissenting:

I respectfully dissent.

The implications of the majority's decision are far reaching and I believe that the decision is wrong. The present dispute involves 871.92 acres of land and a judgment for $16,694, plus interest, for two years' use thereof, not an unusually significant amount in and of itself. But the court does not specify any limiting principles in this area. I see nothing in the majority's opinion which, when coupled with our decision in *Oneida Indian Nation of New York* v. *New York*, 691 F.2d 1070 (2d Cir. 1982), would prevent the Oneida or any other tribe from suing for the full value of all land taken from them at any time during our nation's history in contravention of federal law—to say nothing of the possibility of bringing an action for ejectment. Courts should be reluctant to invite such potentially staggering claims on the skimpy authority relied on today by the majority.

This is not to deny the wrongs that Indian tribes have suffered. They do exist and surely require attention. However, the remedy should not be created by a court of law acting in an environment of legal uncertainty. These are essentially political problems which require a comprehensive solution that the judiciary cannot provide in one sitting.[1] Today's decision is likely to interfere with rather than advance the federal government's policies towards Indians.

To decide that Indian land claims should be resolved by judicial fiat is not only unwise, it is also unnecessary. The Indian tribes have remedies available without resort to the federal courts. Congress has established administrative procedures to resolve Indian land claims and the federal government can sue in federal court to enforce Indian land rights.[2] If the existing federal administrative mechanism is ineffective, the Indians' proper remedy is not in the federal courts, but rather in Congress.

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1 The Indian tribes are considered sovereigns "which, by government structure, culture, and source of sovereignty, are in many ways foreign to the constitutional institutions of the Federal and State Governments." *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 71 (1978); *see also Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 139-40 (1982); *United States* v. *Wheeler*, 435 U.S. 313, 322-23 (1978). Relations with Indian tribes can thus be analogized to relations with foreign nations. The Supreme Court has shown great reluctance to interfere with or take actions that might embarrass the federal political branches' conduct of foreign affairs, *see, e.g.*, *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 697 (1976) (plurality opinion); *First Nat'l City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759, 767 (1972) (plurality opinion); *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 431-33 (1964); *Mexico* v. *Hoffman*, 324 U.S. 30, 35 (1945); *The Schooner Exchange* v. *McFaddon*, 11 U.S. (7 Cranch) 116, 146 (1812) (Marshall, *C.J.*).

2 *See United States* v. *Santa Fe Pacific R.R. Co.*, 314 U.S. 339 (1941); *United States* v. *Candelaria*, 271 U.S. 432 (1926); *Cramer* v. *United States*, 261 U.S. 219 (1923).

I

The majority holds today that the Oneida may maintain a direct action to recover damages for wrongful occupancy. Despite the majority's claim to the contrary, this is truly a novel legal principle. There never has been, and this Court should not now create, a federal common law action. No case has ever held that an Indian tribe may maintain a direct action for damages based upon federal common law.

From the outset of the Union, Indians were considered wards of the United States; the federal government assumed the role of their guardian. *See, e.g., United States* v. *Sandoval*, 231 U.S. 28, 46 (1913); *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (Marshall, *C.J.*) ("[T]hey are in a state of pupilage; their relation to the United States resembles that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants . . . ."); *cf. United States* v. *Kagama*, 118 U.S. 375, 384 (1886) ("From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen.").

From the special guardianship relation between the United States and the Indian tribes, it can be inferred that the Indians should be subject to liabilities under federal law only when Congress sets up a statutory scheme. This has long been settled law. *See, e.g., United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940) (reaffirming that tribal sovereign immunity is coextensive with that of the United States; "[t]hese Indian Nations are exempt from suit without Congressional authorization."). Similarly, it follows that their federal rights should also be based on specific congressional acts. Far from a leap of logic, this is equally settled law:

> The civil rights incident to States and individuals as recognized by what may be called the "law of the land" have not been accorded either to Indian nations, tribes, or Indians. *Whenever they have asserted a legal capacity in the maintenance of their rights, it has been in pursuance of some statute of the United States specially conferring upon them the civil rights of suitors. In all the cases in this court in which the interest of an Indian tribe has been the subject of litigation the proceeding has been under special statute conferring the right upon the claimant to bring a suit.* The ordinary jurisdiction as to persons has never been sought to enforce against the United States the fullfillment of their obligations or the discharge of their duties.

Jaeger v. *United States*, 27 Ct. Cl. 278, 284-85 (1892) (emphasis supplied).[3]

Special statutes giving Indians the rights of suitors were necessary because it was inconceivable to lawmakers and judges in the era of early American common law that Indian tribes would resort to courts of law to enforce their legal rights. *See Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) at 17 (Marshall, *C.J.*) ("At the time the constitution was framed, the idea of appealing to an American court of justice for an assertion of right or a

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3 *See Karrahoo* v. *Adams*, 14 F. Cas. 134 (C.C.D. Kan. 1870) (Federal circuit court had no jurisdiction in a case involving a non-citizen Indian whose complaint did not raise a federal question).

redress of wrong, had perhaps never entered the mind of an Indian or of his tribe."). Thus, viewed from a common law perspective, it is apparent that there never existed a federal common law private cause of action for damages.

Assuming *arguendo* that a federal common law cause of action in favor of the Indians existed, it was preempted by the Trade and Intercourse Acts.

When Congress addresses directly and comprehensively a question previously governed by federal or state common law, that common law is preempted. *Middlesex County Sewerage Authority* v. *National Sea Clammers Association*, 453 U.S. 1 (1981). While the majority does not dispute this, it finds that Congress did not intend to preempt the field because the Trade and Intercourse Acts were not comprehensive statutes. This explanation ignores existing Supreme Court case law on preemption and improperly addresses the issue of congressional intent.

The majority points out that the Acts "did not speak directly to the question of the Indians' ability to enforce their possessory rights by an action in ejectment."[4] But Congress need not specifically legislate on a subject in order to preempt a particular field. In *Hines* v. *Davidowitz*, 312 U.S. 52 (1941), the Supreme Court held a Pennsylvania alien registration statute invalid under the Supremacy Clause partly because the state statute interfered with the federal scheme of registration, even though the state and federal statutes were not explicitly contradictory and there was no express congressional intent to override state legislation. The Court noted that "[e]xperience has shown that international controversies

4 It is not surprising that the Act did not expressly refer to an "existing" federal common law right. Of all the cases cited by the majority to indicate the existence of such a cause of action, *not one* was decided before 1793.

of the greatest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by a government." 312 U.S. at 64. The Court thus reasoned that state law which potentially conflicted with federal law in this sensitive area had to fall because the federal government was the agent of foreign policy in our country and, as the agent, it had determined that a particular scheme of registration was necessary in order to avoid friction with other nations.

The majority ignores the fact that the legislation at the heart of the instant dispute addresses issues of intergovernmental relations as sensitive as those in *Hines*. As the majority notes, President Washington and Secretary of War Knox urged congressional protection of Indian lands in order to reassure Indians who had grown "restive." This protection was provided by the 1790 Act; criminal and other sanctions were added in 1793 in order to put teeth in the 1790 Act. The statutes at issue in *Hines* and in the instant dispute were passed for the same purpose, to avoid war. There can be no justification for finding preemption of state statutory law in the former case but not preemption of federal common law in the latter. Indeed, the present holding turns the normal presumptions about preemption on their respective heads, as federal courts are usually quicker to find preemption of federal common law than state law. *In re Oswego Barge Corp.*, 664 F.2d 327 (2d Cir. 1981). *See Illinois* v. *Outboard Marine Corp.*, 680 F.2d 473, 478 (7th Cir. 1982).

The majority also tries to determine whether the early congressional scheme was comprehensive from a late twentieth century perspective. But, we must remember that it is the intent of the 2nd Congress which we search for here, not the perceived views of a Congress elected

many years later. It is true that the 1790 and 1793 Acts were not comprehensive by today's standards, but they did proscribe certain acts and provide civil and criminal sanctions. Given the hypertechnical nature of the law in the late 18th century, it is unrealistic to believe that Congress intended to allow remedies concurrent to those explicitly promulgated.

The majority's reliance on the language in *United States* v. *Santa Fe Pacific Railroad Co.*, 314 U.S. 339, 354 (1941), is inappropriate, inasmuch as that case involved a mid-19th century statute which allegedly abolished the Indians' aboriginal rights. There, the Supreme Court was talking about the extinguishment of undisputed title to land, not the preemption of a questionable right of a ward to a private cause of action.

II

The majority states that the Nonintercourse Acts were passed to protect Indian tribes and determines, on the basis of the language cited in *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 374-75 (1982), that when a statute is enacted in order to benefit a special class of beneficiaries, the judiciary will normally recognize a remedy for class members if the statute was passed prior to *Cort* v. *Ash*, 422 U.S. 66 (1975). Therefore, reasons the majority, when Congress passed the aforementioned Acts it must have intended that the beneficiaries would be able to enforce their rights by a private action. While superficially appealing, this argument lacks the support of either precedent or legislative history. *Merrill Lynch* does not address the question whether a private cause of action should be implied where Congress has explicitly granted the federal government the power

to sue to protect the rights of the particular group benefited by the statute.

The majority is correct that the Acts were passed in order to protect Indian tribes. However, it takes a great leap of logic to suppose that the Congresses that passed the Acts intended the Indian tribes to have a private cause of action for violations of these Acts. It is difficult to believe that at that time Congress would have left it to the courts to imply such a significant and far reaching remedy, particularly when we remember that the Acts were passed in order to avoid war with the Indian tribes. Obviously Congress never intended the remedy to be available.

I believe that the lower courts that have assumed a private cause of action for a violation of the Acts, *see, e.g.*, *Mashpee Tribe* v. *New Seabury Corp.*, 427 F.Supp. 899, 903 (D. Mass. 1977); *Schaghticoke Tribe of Indians* v. *Kent School Corp.*, 423 F.Supp. 780, 784 (D. Conn. 1976); *Narragansett Tribe of Indians* v. *Southern Rhode Island Land Development Corp.*, 418 F.Supp. 798, 805 & n.3 (D.R.I. 1976), are in error. They use neither legislative history nor valid precedent[5] to support their position.

Similarly, the need for private enforcement because of poor government performance in this area should not affect the outcome here. The government's failure to enforce Indian rights vigorously provides a strong argument for the need for private enforcement. That argument should be made to Congress, however. We should not perform a legislative function. Furthermore, when

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5 These cases all rest upon decisions that recognized a private right of action to Indians when the United States had the power to sue on the same cause of action and to seek the same relief. They do not support the proposition that if the government has a statutorily based power to pursue a remedy, the Indians may bring their own action for a different remedy that does not arise out of the same statute.

construing a statute passed in the late 18th century, we should not consider events which transpired, or failed to transpire, in the subsequent 200 years in order to shed light on congressional intent.

The majority states that even under traditional *Cort* v. *Ash*, 422 U.S. 66 (1975), criteria, a private cause of action may be maintained. I believe the opposite conclusion to be the case here.

This case does not satisfy the second prong of the *Cort* test, namely, whether there is "any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one." 422 U.S. at 78. I believe that congressional silence on this question indicates a desire not to include a private cause of action as a remedy.

The majority states that Congress intended in the 1793 Act to provide "maximum protection" to Indian land. Assuming this to be true, Congress probably never believed private action necessary in order to accomplish maximum protection. The Act provided for criminal sanctions for violations and included a provision authorizing the executive branch to remove violators from Indian land.[6] These sanctions if utilized would appear to be full and adequate remedies for the conduct that Congress wished to proscribe. Furthermore, it would have been an easy matter for Congress to provide for a private cause of action in favor of Indian tribes or to expressly continue an existing common law remedy if one existed. The failure to do so indicates to me that Congress either did not wish to enact such a remedy or that it never considered the issue. Either explanation would produce the same result—no private cause of action was intended.

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6 *See* Majority op. n.12.

The court's reference to *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 18-19 (1979), is inappropriate. There, the Court dealt with a statute, section 215 of the Investment Advisers Act of 1940, that only declared certain contracts void. Neither sanctions, nor remedies, nor any mechanism for voiding contracts were explicitly provided. By contrast, the 1790 Act, *as amended* by the Act of 1793, *did* explicitly provide sanctions and an enforcement mechanism. Indeed, these later enforcement provisions were included *because* the 1790 Act lacked them.

By contrast, the instant dispute is analogous to the claim in *Transamerica* for a private cause of action under section 206 of the Investment Advisers Act. Congress expressly provided judicial and administrative means to enforce section 206 rights, including criminal penalties and authorization to the SEC to enjoin compliance with the Act. 444 U.S. at 20. The Court stated that "[i]n view of these express provisions for enforcing the duties imposed by § 206, it is highly improbable that 'Congress absentmindedly forgot to mention an intended private action.' " *Id.* (citation omitted). As the Supreme Court noted, "[I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it. 'When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.' " *Id.* at 19-20 (citation omitted).

The same reasoning is applicable to the present case. Because Congress explicitly provided for remedies and sanctions in the 1793 Act, it is "highly improbable" that it forgot to include a private cause of action. This is particularly true in view of the importance that Congress

and the President placed on the matter of Indian affairs in the 1790s.

The majority's characterization of the 1822 Act is not convincing. The provision in the 1822 Act referring to Indians as parties does not only make sense, as the majority claims, "if Congress had intended the Trade and Intercourse Acts to authorize Indians to appear as plaintiffs to enforce the Acts, as well as to be defendants." This provision also applies to a suit in which the government seeks to enforce Indians' rights on their behalf. *See Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). In such a case, the Indians in question would be the real parties in interest. Congress could have been indicating that in this type of action the burden of proof would not be on the government as plaintiff-guardian.

In sum, I believe there is no basis upon which the majority can imply a private cause of action by Indians to recover damages for wrongful possession. To hold otherwise is a novel proposition of law, with consequences too broad to be established on such shaky grounds. Demands for redress of violations of the Acts are better directed to the other branches of the federal government.

I would reverse and remand with directions to dismiss the complaint.